

**The Problem of Harm,
its Significance in the Criminal Law,
and its Role in Sentencing Law**

by

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Statements

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of the candidate's knowledge and belief no material previously published or written by another person except where due acknowledgment has been made in the text of the thesis.

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This thesis states the law as at 1 June 2004.

Dedication

This thesis is dedicated to the Law School at the University of Tasmania
and to all of the people whose efforts over so many years have made it such
a wonderful place to learn about law and the good life.

Abstract

The concept of harm and the nature of its proper role in the criminal law has challenged legislators, judges and philosophers for over two thousand years. More recently, sentencing commentators have suggested that we need a theory of harm that can justify imposing principled controls on the extent to which the state is entitled take the harmful effects of a crime into account when punishing offenders.

This thesis attempts to resolve both the philosophical and the practical problems posed by the highly contested concept of harm. It abandons the traditionally divisive debates over the purposes of punishment and focuses instead on constructing a two dimensional model of a crime that reflects our common nature as human beings, our shared language and culture of value and our common identity as members of a community governed by a state which exists for the purpose of providing the conditions under which we can live a good life together. This equality based model links the three concepts of harm, wrongdoing and fault with the three elements of the good life that we appear to value most, namely, our welfare, our autonomy and our desire to be respected by others as equals. It is used to analyse our criminal justice practices with the aim of ensuring that the decisions that we make at each of the three key decision making stages of legislation, conviction and sentencing can be structured around a single, coherent and consistently applied scheme of values.

The thesis concludes by presenting an account of the criminal law and the sentencing process that relies upon the normative aspects of wrongdoing and fault to justify imposing limits on the role played by harm. This model:

- allocates distinct functions to the concepts of harm, wrongdoing and fault in the assessment of the seriousness of a crime;
- explains the significance of harm's role in the legislative task of setting general penalty ranges and the judicial task of determining individual sentences;
- contains a two-limbed remoteness test limiting the categories of harm that may be taken into account;
- justifies a principle of comparative fault that limits the quantum of punishment where the state itself is partly responsible for the harm caused by offenders; and
- demonstrates that it is possible to construct a principled and coherent account of the criminal law and sentencing law without first having to agree upon a theory of punishment.

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At the Law School

First, I want to thank my supervisor, Professor Kate Warner, whose inspiring intelligence, professionalism and sheer enthusiasm for sentencing law first attracted me to this topic and whose faith, advice and support kept me going to the end.

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At Home

I want to thank four loving and patient members of my family who have made my own life so good: Peter, whose loving companionship and dedication to scholarship is a constant source of help and inspiration; Simon and Alexander, who keep reminding me that there is more to the good life than studying the law; and Marjorie, who did a wonderful job of proofreading the thesis and who has given me her loving support in so many endeavours my whole life long.

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Introduction

(a) Criminal punishment and the problem of harm

The concept of harm and the nature of its role in the criminal law has challenged legislators, judges and philosophers for over two thousand years. Echoes of Aristotle's account of the nature of wrongdoing in *The Nichomachean Ethics*,¹ which gives primacy to the familiar concepts of harm and culpability, can be found in many contemporary accounts of the nature of criminal conduct.² However, philosophers who debate the moral limits and the proper structure of the criminal law have been unable to agree upon which of the two is to be the central organising principle within that structure.³ Neither have they been able to agree upon a definition of the 'morally loaded' and 'essentially contested' concept of harm.⁴ Some scholars like Joel Feinberg, Nicola Lacey and Celia Wells have insisted that the notoriously difficult concept of harm is not a purely factual concept, but has important and complex

¹ *The Nichomachean Ethics*, (Oxford University Press, 1998), written 4th century BCE, at 127: 'if a man harms another by choice, he acts unjustly'. As I explain in section 10.2 of Chapter Ten, Aristotle was not attempting to define a crime as such.

² See, eg, Joel Feinberg's four volume masterpiece on *The Moral Limits of the Criminal Law*, which comprises: *Harm to Others*, (Oxford University Press, 1984); *Offense to Others*, (Oxford University Press, 1985); *Harm to Self*, (Oxford University Press, 1986); and *Harmless Wrongdoing*, (Oxford University Press, 1988). These echoes of Aristotle can be found in Feinberg's explanation that 'the criminal law system is the primary instrumentality for preventing people from intentionally or recklessly harming one another' in *Harm to Others* at 31 (see also 107-108); and John Darley, citing Paul Robinson, who describes the 'paradigmatically criminal action' as 'one in which a person intentionally inflicts a harmful action, which he knows is morally wrong, on another' in 'Just Punishments: Research on Retributional Justice' in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life*, (Cambridge University Press, 2002) 314 at 319. See also Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996).

³ Larry Alexander in 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1 at 1, suggests that one of the key issues in the criminal law is the debate over whether harm or culpability should be the central organising principle of criminal liability.

⁴ McCormick N, *Legal Right and Social Democracy*, (Clarendon Press, Oxford, 1982) at 29; and HLA Hart, (Stanford University Press, 1981) at 153. See also Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 32-33.

normative dimensions;⁵ and others insist that there is a special kind of ‘penal’, ‘social’, or ‘criminal’ harm which characterises the conduct that we recognise as criminal.⁶

The enduring influence of John Stuart Mill’s famous ‘harm to others principle’⁷ demonstrates the important role that the concept plays in our continuing debates over the purpose and proper scope of our criminal laws and the special personal and community interests that they protect.⁸ However, few philosophers have been able to explain how Mill’s harm principle can account for our current criminal laws without finding it necessary either to reformulate the notion of harm into special extended definitions or to supplement the principle with a range of other ‘moderating maxims’, ‘liberty-limiting’ principles and ‘coercion-legitimizing’ principles.⁹ Our difficulties in defining not only harm, but the very notion of a crime itself, have complicated our debates over the purpose and structure of our criminal laws because, as Antony Duff has pointed out, before we can continue these debates, ‘we must first get clear about the notions of harm and wrongdoing, and the relationship(s) between them.’¹⁰

Philosophers and legal academics have traditionally directed their attention to the issue of harm when discussing the scope of the criminal law and the limits on the exercise of state power. However, more recently, critics like Robin West have criticised the inadequate vision of the good life that underpins much of the analysis of harm’s moral significance and expressed dissatisfaction with many of the standard accounts of harm’s relevance ‘as a meaningful target of law.’¹¹ West argues that unless

⁵ Feinberg, *Harm to Others*, above footnote 2 at 214; Lacey N & Wells C, *Reconstructing Criminal Law*, 2nd ed, (Butterworths, London, 1998) at 7.

⁶ See, eg: Hall J, *General Principles of Criminal Law*, 2nd ed, (Bobbs-Merrill, Indianapolis, 1960) at 241-242; Burgh RW, ‘Guilt, Punishment and Desert’ in Schoeman F (ed), *Responsibility, Character and the Emotions*, (Cambridge University Press, 1987) 316 at 331 and 334.

⁷ Mill JS, *On Liberty and Other Essays*, (Oxford University Press, 1998) at 13-14.

⁸ See, eg: Feinberg’s discussion in *The Moral Limits of the Criminal Law*, above footnote 2; Eser A, ‘The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests’ (1965) 4 *Duquesne University Law Review* 345.

⁹ Feinberg, *Harmless Wrongdoing*, above footnote 2 at ix-xx. As I explain in sections 1.2 and 1.2 of Chapter One, not even utilitarians have been able to restrict themselves to Mill’s original formulation.

¹⁰ Duff RA, ‘Harms and Wrongs’ (2001) 5 *Buffalo Criminal Law Review* 13 at 16.

¹¹ West R, ‘The Other Utilitarians’ in Bix B (ed), *Analyzing Law: New Essays in Legal Theory*, (Clarendon Press, Oxford, 1998) 197 at 216, criticising the standard legal economic approach to the

we can develop ‘a language of harms’ that can adequately reflect a richer account of the good life for human beings we will be unable to reform our law or even begin to determine the ‘the worth, value, goodness or badness’ of our current laws.¹²

Other commentators like Andrew Ashworth, Andrew von Hirsch and Nigel Walker have suggested that our current sentencing law is also in need of a theory of harm that can both account for harm’s role in sentencing and justify the imposition of principled controls on the extent to which the state is entitled take the harmful effects of a crime into account when punishing offenders.¹³ Andrew von Hirsch,¹⁴ in particular, has led the way towards solving the problem of harm’s role in sentencing that was initially raised as an issue by Sir Rupert Cross in 1965 and which, as Andrew Ashworth has recently reminded us, remains as contentious now as it was almost 40 years ago.¹⁵

definition and analysis of harm. West expresses similar views in *Caring for Justice*, (New York University Press, 1997). See also Shiffrin SV, ‘Wrongful life, Procreative Responsibility, and the Significance of Harm’ (1999) 5 *Legal Theory* 117, who criticises the account of harm developed by Joel Feinberg in *Harm to Others* (above footnote 2) and suggests that we need to develop a new model of harm that can explain its moral significance in the law.

¹² West, ‘The Other Utilitarians’ above footnote 11 at 220 (calling for a language of harms) and at 197 (commenting on the worth of our laws); see also *Caring for Justice*, above footnote 11 at 175.

¹³ Ashworth A, ‘Criminal Justice and Deserved Sentences’ [1989] *Criminal Law Review* 340, ‘Some Doubts About Restorative Justice’ (1993) 4 *Criminal Law Forum* 277, *Sentencing and Criminal Justice*, 3rd ed, (Butterworths, London, 2000) at 73 and 96-100, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225 at 244; von Hirsch A, *Past or Future Crimes*, (Manchester University Press, 1985) suggests that ‘we need a theory of harms’ at 67, ‘Injury and Exasperation: An Examination of Harm to Others and Offense to Others’ (1986) 84 *Michigan Law Review* 700, ‘Proportionality in the Philosophy of Punishment: From Why Punish to How Much?’ (1990) 1 *Criminal Law Forum* 259 at 288-289: ‘harm is less well charted’, *Censure and Sanctions*, (Clarendon Press, Oxford, 1993) at 30: ‘the harm dimension’ of seriousness is ‘puzzling’; von Hirsch A & Jareborg N, ‘Gauging Criminal Harm: A Living-Standard Analysis’ (1991) 11 *Oxford Journal of Legal Studies* 1 at 3; Walker N, ‘Harms, Probabilities and Precautions’ (1997) 17 *Oxford Journal of Legal Studies* 611, *Aggravation, Mitigation and Mercy in English Criminal Justice*, (Blackstone Press, London, 1999) at 35 and 121-129. See also Van Ness DW, ‘New Wine and Old Wineskins: Four Challenges of Restorative Justice’ (1993) 4 *Criminal Law Forum* 251 who argues that proponents of restorative justice also need to develop a system to determine harm rationally.

¹⁴ See the references to von Hirsch in footnote 13 above, particularly his ground breaking article on the ‘Living-Standard Analysis’ written with Nils Jareborg published in 1993.

¹⁵ Sir Rupert Cross raised the problem of harm in his inaugural lecture on sentencing delivered before the University of Oxford upon his appointment as Vinerian Professor of English Law in 1965:

The problems in defining harm and our difficulties in formulating the elements that ought to be considered when we are determining the seriousness of a crime complicate our analysis of harm's role in the final stage of the criminal justice process. These problems, combined with the difficulties that we encounter at the earlier stages over the relative importance of harm and culpability and the disagreements between utilitarians and deontologists over the proper purpose of the criminal law, make it hard to devise a coherent approach to the problem of harm that can be consistently applied at each of the three stages of legislation, conviction and sentencing that are contained within that decision making process.

Utilitarians have always focused on harm, but, because they aim to minimise harm, they have also warned against the unquestioning imposition of criminal sanctions on offenders and insisted that we must follow a principle of parsimony in punishment. Moderate retributivists, represented by von Hirsch, for example, who advocate reducing our penalty scales,¹⁶ have also insisted that limits should be placed on the extent to which the harm done by offenders can affect their sentences. However, in recent years our debates over criminal justice and sentencing have been enlivened and challenged by two critical movements that seek to give an increased significance to the harm done by crime. Hard line retributivists who champion the *lex talionis* concentrate on the total harm done by offenders to victims and their communities and seek to take all that harm into account in order to justify harsher penalties.¹⁷ On the

Paradoxes in Prison Sentences, (Oxford University Press, 1965) at 17-22; see also *The English Sentencing System*, (Butterworths, London, 1971) at 120-121. Coincidentally, the same issue was also raised by Andrew Ashworth, the current Vinerian Professor of English Law, in his own inaugural lecture delivered 34 years later: 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225 at 244.

¹⁶ See von Hirsch, *Censure and Sanctions*, above footnote 13 at 2-5, 40-45 and 88-102.

¹⁷ A leading example is the approach of Scalia J of the US Supreme Court, who (dissenting) in *Booth v Maryland* 482 US 496, 96 L Ed 2d 440 (1987) at 519-520 (458-459), argued that the total harm or 'full reality of human suffering' caused by an offender, whether foreseen or unforeseeable, should be taken into account when sentencing. A majority of the US Supreme Court (including Scalia J) adopted this position, citing *Exodus* and the *lex talionis*, in the later case of *Payne v Tennessee* 501 US 808, 115 L Ed 2d 720 (1991) at 819-820 (731-732). For commentary see: Gey SG, 'Justice Scalia's Death Penalty' (1992) 20 *Florida State University Law Review* 67, especially at 76 and 120-122; Bandes S, 'Empathy, Narrative, and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361; Dugger A, 'Victim Impact Evidence in Capital Sentencing: A History of

other hand, the advocates of restorative justice focus on making good the harm done to victims of crime and safely returning both victims and offenders who have resolved their conflicts to their communities.¹⁸

This new focus on the victim leads inevitably to an increased focus on the harm that is done by crime, not only to victims, but to the wider community as well. Both movements will encounter the same three part problem that appears to challenge our current criminal justice system, namely, the task of developing a workable account of harm and explaining not only its significance in the criminal law but also its proper role in sentencing law. It seems, therefore, that whatever response our criminal justice system takes to the question of criminal punishment in the future – whether it is the traditional discretionary approach, the new guidelines approach, the consequentialist or utilitarian approach, the old or new retributive approach, or a complete change towards a restorative approach to justice – the problem of harm will remain at its centre.

Incompatibility' (1996) 23 *American Journal of Criminal Law* 375; and Cornille SA, 'Retribution's "Harm" Component and the Victim Impact Statement' (1993) 18 *Dayton Law Review* 389. Some academic opinion supports the approach taken by Scalia J, see: Kinsella NS, 'A Libertarian Theory of Punishment and Rights' (1997) 30 *Loyola of Los Angeles Law Review* 607, who devises a grotesque scheme of punishments designed to match the full extent of the harm done by a crime; Loewy A, 'Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated' (1988) 66 *North Carolina Law Review* 283, who comments at 289-290 that taking harm into account 'mirrors life' because 'the world is full of instances in which equally culpable people wind up very differently'; and Whiteley D, 'A Theoretical Framework for Taking Harm Done into Account in Sentencing' (1999) 2 *Ethics and Justice* 109, who presents a 'naturalistic' case for taking the harm done into account on the basis that the harm done affects our emotional response to an event.

¹⁸ See eg: Braithwaite J, *Crime, Shame and Reintegration*, (Cambridge University Press, 1989); 'Restorative Justice: Assessing the Optimistic and Pessimistic Accounts' in Tonry M (ed), *Crime and Justice: A Review of Research, Volume 25*, (University of Chicago Press, 1999); Braithwaite J & Pettit P, *Not Just Deserts: A Republican Theory of Punishment* (Clarendon Press, Oxford, 1990); Strang H & Braithwaite J (eds), *Restorative Justice: Philosophy to Practice*, (Aldershot, Ashgate, 2000); Christie N, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1, 'Against Just Desert' (1992) 5 *Canadian Journal of Law and Jurisprudence* 5; Van Ness DW, *Crime and Its Victims*, (Intervarsity Press, Illinois, 1986), 'Restorative Justice' in Galaway B & Hudson J (eds), *Criminal Justice, Restitution and Reconciliation*, (Willow Tree Press, New York, 1990) 7, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Criminal Law Forum* 251; and von Hirsch A et al (eds), *Restorative Justice and Criminal Justice*, (Hart, Oxford, 2003).

(b) Aim

This thesis aims to present an account of the concept of harm that can explain its role at each of the three stages of legislation, conviction and sentencing and can ensure that the decisions that we make within the criminal justice decision making process can be structured around a single, coherent and consistently applied scheme of values. The questions that arise from the problem of harm resolve themselves into three main areas of inquiry: the first arises from our confusion over the nature of harm itself; the second results from our debates over harm's role and relative importance in the criminal law at the stages of legislation and conviction; and the third set of issues arise at the sentencing stage when we must choose the punishments that we will impose upon offenders for their crimes and the harm done or risked by those crimes.

The first area of inquiry contains four questions that focus directly on the problem of harm itself. These questions arise from our difficulties in understanding the meaning and nature of this controversial and contested concept:

- How can we define harm?
- What is the test for causing harm?
- What is the nature of harm: is it a normative or a purely factual concept?
- Is there a special kind of 'criminal' harm?

The second area of inquiry focuses on harm's significance in the criminal law. This inquiry is aimed at answering two questions that relate to the relative importance of harm's role at the two key stages of legislation and conviction:

- What role does harm play in our legislative decisions to declare conduct to be a crime and to deal with it within the criminal justice system rather than our system of civil or private justice?
- Which is to be the controlling factor when we convict offenders and hold them responsible for their conduct: harm or culpability?

The third inquiry seeks answers to two questions about harm's role in sentencing:

- Should the harm that results from an offender's crime be taken into account as a relevant factor in sentencing?
- If harm is relevant, what limits should we place upon the extent to which the state can track the harmful effects of a crime when punishing offenders?

(c) Research approach

The answers to our questions about harm and the criminal law are inter-linked and, to some extent, circular: the way we define and limit the tracking of harm will be influenced by our initial justification for taking harm into account; and our conception of what harm is will in turn affect our purpose in responding to it and point to a way of responding to it. The nature of a community's response to harm will be influenced too by its particular conceptions of the nature of wrongdoing, its wider conceptions of the nature of justice and its views not only of the aims of criminal law (and law more generally), but also of the nature of the state and its role in securing the health, safety and welfare of its citizens. The answers that the members of any community give to these questions of value, worth and well-being lie ultimately in their visions of what a good life and a good community might be.¹⁹ These are the issues that have always faced human beings living together in continuing communities and they have been debated by philosophers for thousands of years.²⁰

Despite the length and breadth of these ongoing philosophical debates I will not, however, approach the problem with the traditional question which seeks first to settle upon a controlling purpose of punishment that will in turn dictate the solution to the problem of harm in the criminal law. Neither do I propose to trawl through a comparative analysis of deterrence, rehabilitation, retribution, denunciation and incapacitation in order to consider whether the taking into account of the harm done by crime is consistent with any or all of these goals. I refrain not only because that task has been done comprehensively by others,²¹ but more importantly, because I do

¹⁹ Nicola Lacey focuses on the fundamental community values and interests that account for the shape of the criminal law in *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 101 and 186.

²⁰ See the entry for 'Eudaimonia' (which can be translated either as happiness, or the state of having an objectively desirable or good life) in Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 252. See also Nussbaum MC, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, (Cambridge University Press, 1986) discussing the debate between Aristotle and Plato on the content of *eudaimonia*.

²¹ The classic, comprehensive, contribution is Stephen Schulhofer's article 'Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law' (1974) 122 *University of Pennsylvania Law Review* 1497. For similar approaches see also: Gobert J, 'Fortuity of Consequence' (1993) 3 *Criminal Law Forum* 1; Hinton M, 'Expectations Dashed: Victim Impact

not accept the premise that criminal punishment is based on either a single controlling aim or a hybrid set of backward and forward looking goals derived from moral philosophy that dictate the function and form of the different stages of the criminal justice process.²²

Statements and the Common Law Approach to Sentencing in South Australia' (1995) 14 *University of Tasmania Law Review* 81; Murphy RS, 'The Significance of Victim Harm' (1988) 55 *University of Chicago Law Review* 1303; and Talbert PA, 'The Relevance of Victim Impact Statements to the Criminal Sentencing Decision' (1988) 36 *University of California at Los Angeles Law Review* 199.

- ²² In this respect I differ from many commentators who argue that we must first agree upon a theory of punishment before we can construct a theory of the criminal law. See, eg: Alexander L, 'The Philosophy of Criminal Law' in Coleman J & Shapiro S (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford University Press, 2002) 815 at 815; Coleman J, *The Practice of Principle* (Oxford University Press, 2001) discussed in Harcourt BE, 'Joel Feinberg on Crime and Punishment: Exploring the Relationship Between *The Moral Limits on the Criminal Law* and *The Expressive Function of Punishment*' (2001) 5 *Buffalo Criminal Law Review* 145 at 155-156; Hurd HM, 'What in the World is Wrong?' (1994) 5 *Journal of Contemporary Legal Issues* 157 at 157; and Moore MS, *Placing Blame*, (Clarendon Press, Oxford, 1997) at 23-35.

HLA Hart, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) and Paul Robinson, 'Hybrid Principles for the Distribution of Criminal Sanctions' (1988) 82 *Northwestern University Law Review* 19 have both suggested that a combined but carefully structured approach is possible. Those who maintain that a single normative theory cannot determine the shape of all criminal doctrines include: Ten CL, *Crime, Guilt and Punishment*, (Clarendon Press, Oxford, 1987), Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988); Hampton J, 'How You can be Both a Liberal and a Retributivist' (1995) 37 *Arizona Law Review* 105 at 112; Kahan DM & Nussbaum MC, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Colorado Law Review* 269 at 350. See the survey in Wood D, 'Retribution, Crime Reduction and the Justification of Punishment' (2002) 22 *Oxford Journal of Legal Studies* 301.

In relation to sentencing, see: Andrew Ashworth, who in *Sentencing and Criminal Justice*, 3rd ed, (Butterworths, London, 2000) at 63 and 84 argues that we should declare a primary rationale for sentencing but allow it to be trumped by other rationales in defined circumstances; Bagaric M, *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001) who suggests that only a utilitarian account can provide a rational approach to sentencing; Lovegrove A, 'Judicial Sentencing Policy, Criminological Expertise and Public Opinion' (1998) 31 *Australian and New Zealand Journal of Criminology* 287 at 287 who maintains that sentencing must be based on a coherent penal policy; and Andrew von Hirsch in *Censure and Sanctions*, (Clarendon Press, Oxford, 1993) who argues at 6 that the institution of punishment has 'preventative as well as reprobative features' but who insists (at 12-14) that the primary censure or blaming function has primacy over the 'preventive function' which provides an additional or 'prudential reason aimed at discouraging the proscribed conduct.' For a general survey of these debates over the purposes and

A further reason for rejecting the traditional starting point is the poor guidance that it produces. Ashworth has argued that allowing judges to choose freely from a group of contradictory purposes of punishment creates ‘sentencing anarchy’.²³ Alternative approaches, which seek to rank those purposes or give one the position of primacy while allowing others to apply in exceptional cases, seem equally problematic because the debates that we must engage in to nominate the primary purpose and set the conditions under which we will allow exceptions to it will lead us inevitably back to the very disagreements that divided us in the first place. A third reason for avoiding these theories of punishment as a starting point is the fact that our sentencing judges do not appear to place any great store upon using them in practice.²⁴

competing rationales see: Ashworth A & von Hirsch A (eds), *Principled Sentencing*, 2nd ed, (Hart Publishing, Oxford, 1998).

Cyrus Tata has suggested that the ‘philosophical-jurisprudential’ purposes of punishment cannot provide a coherent account of sentencing behaviour in ‘Accountability for the Sentencing Decision Process – Towards a New Understanding’ in Tata C & Hutton N (eds), *Sentencing and Society: International Perspectives*, (Ashgate, Aldershot, 2002) 398 at 401; and ‘Resolute Ambivalence: Why Juries Do Not Institutionalise Their Decision Support Systems’ (2000) 14 *International Review of Law Computers and Technology* 297. Tata has developed these views further in ‘The Quest for “Coherence” in the Sentencing Decision Process: Noble Aspiration or Chimera?’ a paper presented to the *Second International Conference on Sentencing and Society*, at the Centre for Sentencing Research, Law School Strathclyde University, Glasgow, Scotland, UK, 27-29 June 2002. Tata argues in ‘Resolute Ambivalence’ at 308-311 that sentencing behaviour can be explained as ‘essentially a socially pragmatic exercise’ and suggests that we should not look for coherence in purely ‘philosophical-jurisprudential’ terms.

²³ ‘Criminal Justice and Deserved Sentences’ above footnote 13 at 350. Ashworth scorns this ‘cafeteria’ or ‘smorgasbord’ approach which cements the possibility of unjustified disparities and uncertainty into the system in *Sentencing and Criminal Justice*, above footnote 13 at 62-64, 84, and 350-353. Ashworth (at 63) criticises the Victorian Supreme Court’s ‘instinctive synthesis’ approach to sentencing in *Williscroft* [1975] VR 292 at 299-300 as articulating no clear priorities. I would agree that a process of instinctively synthesising the competing purposes of punishment is incoherent, but would argue that when judges turn to the final task of determining the quantum of a sentence once they have found the relevant facts, applied the relevant principles and consulted the relevant sentencing range, they do reasonably use an ‘instinctive’ process to arrive at the particular sentences in the particular cases before them.

²⁴ See: Bagaric, above footnote 22 at vii and references therein; Fitzmaurice C & Pease K, *The Psychology of Judicial Sentencing*, (Manchester University Press, 1986); Fox RG & Freiberg A, *Sentencing: State and Federal Law in Victoria*, 2nd ed, (Oxford University Press, Melbourne, 1999)

I suggest that a better approach is to focus directly on the most important aspects that characterise the broad structures of our current criminal and sentencing law and seek to find the sense behind our practices without first assuming that their source must lie only within a purpose of punishment that has been justified by reference to a ‘cosmic’ theory of ethical value – or right and wrong. This approach is fortified by the observations of Ludwig Wittgenstein who argued that ‘where philosophy was caught between apparently unavoidable poles’ (in the way that our current thinking about criminal justice and sentencing is caught between the rival accounts proposed by consequentialists and deontologists) it is the ‘common presupposition of both’ that needs to be rejected before we can make any progress.²⁵ I propose, therefore, to deny the common assumption made both by Kant inspired retributivists and Mill inspired utilitarians, namely, that there is an overriding ethical purpose of punishment that can control all of the features of our criminal justice practice and which will dictate the choices that we must make when we decide upon the legislative scope of the criminal law and our punitive responses to those who breach it.

One of my aims is to show that the ‘purposes discourse’ has outlived its usefulness both as a starting point for the development of sentencing law and as an account of the practice of criminal punishment. By avoiding the debate’s traditional starting point which is based upon finding a (usually highly contested) theory of ethical value, I hope to avoid its (equally contested) conclusions and present an alternative interpretation of the place of harm in our criminal and sentencing law that may attract more consensus. Some commentators, like Alan Norrie and Mirko Bagaric, for example, have argued that our criminal justice practices and our sentencing systems are neither rational, nor principled, but are, rather, caught between irreconcilable poles, hopelessly contradictory, fundamentally ambiguous, and incapable of delivering either individual or social justice.²⁶ If these critics are right, our criminal justice

at 83 and references therein; the references in footnote 22 above to Cyrus Tata’s work on the ‘philosophical-jurisprudential’ purposes of punishment and sentencing behaviour; and Warner K, *Sentencing in Tasmania*, 2nd ed, (Federation Press, Sydney, 2002) at 63 and references therein.

²⁵ Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 913.

²⁶ See Norrie A, *Crime, Reason and History*, (Weidenfeld and Nicolson, London, 1993); ‘Simulacra of Morality? Beyond the Ideal/Actual Antinomies of Criminal Justice’ in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 101; *Punishment, Responsibility and Justice: A Relational Critique*, (Oxford University Press, 2000). For critique, see Duff RA, ‘Law,

practices could not yield any coherent interpretation upon which to base a principled model of the decision making process. However, I believe that while it may not be possible to reconcile every decision made within our criminal justice system, it is nevertheless possible to make sense of its basic structures.

My methodology in this thesis is modelled on Wittgenstein's approach to analytical philosophy. He maintained that philosophy was a battle against 'the bewitchment of our intelligence' by language and theory.²⁷ Rather than seeking to understand the meaning of a word or a social practice by consulting philosophical explanations, Wittgenstein suggested that we should 'take a look' at what the practice does and the way it is used.²⁸ He pointed out that a problematical practice will often cease to be a problem once we can see and describe more clearly the bedrock of sense upon which it is based.²⁹ This approach, which mirrors the common law tradition of practical reasoning derived from a body of cases, does not mean that we can never develop a useful account of the practice, but it does tell us that the theory is not always a useful place to start an investigation. It may also mean that we have to reassess what a theory is and recognise that the best theories can be, as Wittgenstein suggested, merely better descriptions of things we already know, but have not always understood.³⁰

This thesis, then, will not necessarily cover new ground: rather, it seeks to reorganise in a new light the insights that have arisen from the familiar debates over the harm principle, the criteria for criminalising conduct, the justifications for punishment and the criminal justice system, the issue of proportionality in sentencing,

Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of Legal Studies* 189; 'Principle and Contradiction in the Criminal Law' in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 156. See also Bagaric M, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597; *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001) who describes our current sentencing system as irrational.

²⁷ Wittgenstein L, *Philosophical Investigations*, (Basil Blackwell, Oxford, 1968) at paragraph 109.

²⁸ Wittgenstein, *Philosophical Investigations*, above footnote 27 at paragraphs 66, 109-111 and 340.

²⁹ Wittgenstein, *Philosophical Investigations*, above footnote 27 at paragraphs 109-111, 125-127 and 217. See also paragraph 133: the true aim of philosophy is peace.

³⁰ Wittgenstein's method first identifies the puzzle, changes the way we characterise the issues, and then seeks not to solve the problem by philosophical argument but to dissolve it using 'cases, cases and cases': see Wisdom J, *Paradox and Discovery*, (Basil Blackwell, Oxford, 1965) at 88-89. See also Marshall SE & Duff RA, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7 for a recent application of this approach to the problem of rape.

and the nature of a crime. Nor will it exclude philosophy as irrelevant to the discussion. Philosophy has always been a valuable source of argument, confirmation and principled criticism of our legal practice.³¹ Consequently, the points made by both traditional philosophers and the more recent critics will figure strongly in the discussion as the issues are identified and possible solutions are sought to the problem of harm and its proper role in our criminal justice decision making process.

(d) Structure of the thesis

This thesis attempts to resolve some of the theoretical and the practical problems posed by the highly contested concept of harm within our criminal justice system. To achieve this aim I will conduct four interlinked investigations. The first inquires into the meaning and nature of the concept of harm and the associated concepts of wrongdoing, fault and crime. The second looks at the purpose of our criminal law and the conception of the good life that appears to be embodied within it. The third investigates the most significant features of the practices found within our criminal justice system and the values that are implicit within those practices; and the fourth seeks to identify the principles that justify those practices. These four investigations will be discussed in the following parts of the thesis:

The investigation of the <i>meaning</i> of the key concepts.	(Parts I, II and III)
The investigation of the <i>purpose</i> of our criminal laws.	(Parts III and IV)
The investigation of the <i>values</i> implicit in our practice.	(Part IV)
The investigation of the <i>principles</i> that justify our practice.	(Part IV)

1. THE INVESTIGATION OF THE MEANING OF THE KEY CONCEPTS

This investigation is based on the premise that before we can recognise instances of harm and decide upon the role that harm should play in our criminal justice decision making process, we must first understand the meaning and the essential nature not only of the concept of harm itself, but also of the concepts with which it is most commonly associated in the criminal law, namely, the three normative concepts of crime, wrongdoing and fault. This investigation will consider not only the meaning

³¹ See Posner RA, *The Problems of Jurisprudence*, (Harvard University Press, 1990) at 348. While he shares the doubts that philosophers like Gilbert Harman and Bernard Williams have expressed about whether philosophy can provide answers to specific legal or ethical questions, Posner does agree that philosophy is a helpful source of criticism.

of these four concepts but also the nature of the relationship between them and will speculate upon the possible function that each may play in structuring our criminal justice decision making process. The issues to be resolved by this preliminary investigation are:

- the definition of harm [Chapters Two and Six];
- whether harm is a factual or a normative concept [Chapters Two and Six];
- the test for identifying harm [Chapter Two];
- the definition and nature of the concept of wrongdoing [Chapter Three];
- the definition and nature of the concept of fault [Chapter Three];
- the definition and nature of the concept of a crime [Chapter Five];
- the relationship between these concepts [Chapter Four];
- the aspects that should determine the seriousness of a crime [Parts I and II]; and
- the possible functions that could be given to these concepts [Chapter Seven].

My investigation into the meaning, nature and role of these key concepts, which occupies the first two parts of the thesis, will involve an analysis of the way that each of these terms is used in ordinary language, an examination of the way that they are used within our criminal justice system, and a critical analysis of the suggested definitions of these concepts that have been put forward by philosophers and legal academics. I conclude from this investigation that we should view harm as a purely factual concept and will suggest that its definition – as the adverse effect of an event that makes something or someone worse off than they were before the event – contains within it a test that enables us to identify instances of harm in practical cases. On the other hand, I conclude that the definitions of the normative but open and empty concepts of crime, wrongdoing and fault, give no guidance as to their content or any indication of the role that the concept of harm ought to play in determining the content and structure of our criminal and sentencing laws. With this issue in mind, and having settled upon a set of definitions of each of these concepts that will aid the analysis, I will turn away from the investigation of meaning towards the second investigation into the apparent purpose of our criminal laws themselves.

2. THE INVESTIGATION OF PURPOSE

Once we know what the purpose of any practice is, we can use that purpose to guide our decisions about both its content and the structure of its rules. So, to understand how we might determine the content of the criminal law and establish the

role that harm should play within our decisions to legislate, convict and punish offenders, Part III of this thesis will consider the nature of our community's conception of the good life and see whether it is possible to make any links between that conception of the good life and our current criminal laws. This investigation is based on the premise that before we can identify acceptable criteria for defining criminal wrongdoing – and decide what to do in response to that criminal conduct – we must first have a prior conception of the constituent elements of a good life in a good community.

Consequently, in Part III of the thesis, I will begin by applying the definitions of the three concepts of wrongdoing, harm and fault that were developed in Parts I and II to the three most important elements of the good life for human beings, which I will suggest are our welfare, our autonomy and our desire to be respected by others as an equal. The first two Parts of the thesis focus on the language and the concepts that we share. The third Part, which considers the nature of the good life and the links that we can make between the positive aspects of the good life and the negative aspects of a crime, will focus on the other important aspects that we have in common, and which determine the kinds of lives that we want to share together and the elements of the good life that we want to protect. These aspects include: our shared values; our shared human nature as physical, emotional, self-directed, reasoning beings; our shared need as social and political beings to live together in communities; and, in modern times, our shared subjection to the government of the state. The issues covered by this investigation include:

- the nature of the good life for human beings [Chapter Eight];
- the links that can be made between the three *positive* elements of the good life, ie, welfare, autonomy and respect, and the three *negative* aspects of a crime, ie, wrongdoing, harm and fault [Chapter Nine]; and
- the nature of a crime and the apparent purpose of our current criminal laws [Chapter Nine].

I conclude from this investigation that our community's conception of the good life, like our understanding of a crime, contains two dimensions which comprise both normative and factual elements. I suggest first, that we can link the two factual elements of welfare and autonomy with the factual concept of harm, and secondly, that the relational element of the good life, ie, being respected by others as an equal, informs our understanding of the normative aspects of wrongdoing and fault. This

investigation also concludes that both the normative respect based elements and the factual harm based elements of the good life for human beings are reflected into our understanding of a crime and suggests that both of these dimensions should therefore be relevant to our sentencing decisions. I argue that we can define a crime as conduct that is read as bearing a message of disrespect for the equal value of others and their equal entitlement to pursue and enjoy their welfare and exercise their autonomy within the boundaries provided for by the state and I suggest that in order to complete our understanding of our criminal justice practices, we should supplement the traditional factual ‘harm to others’ principle with a normative principle that requires ‘equal respect for others’.

However, while this investigation into the apparent purpose of our criminal laws does allow us to conclude that the factual harm based aspects of a person’s wrongful conduct should be relevant to our decisions to criminalise, to convict and to punish, it does not give any indication of which of the two dimensions should take precedence when we must set the moral limits of both our criminal law and our sentencing law. So, to answer this question about the relative importance of the aspect of harm, I will turn to the third investigation of the practices that we find within our criminal justice decision making process itself and search for the values that account for the decisions that we have made at each of the three crucial decision making stages within that process.

3. THE INVESTIGATION OF THE VALUES IMPLICIT IN OUR PRACTICE

The premise upon which this investigation is made is that our criminal justice system – as a rational system – should aim for a consistent treatment of harm that can ensure that the decisions taken at each stage of the criminal justice decision making process will form part of a coherent whole. Consequently, the link made in Part III between the three positive elements of the good life and the three negative aspects of a crime will be used in the final Part of the thesis to introduce a model of a crime that can be used to evaluate the decisions taken within our criminal justice process and to assess the relative seriousness of a crime. In Part Four I will use this two dimensional ‘good life’ model to analyse the decisions about the structure and content of the criminal law, the defences to a charge, the nature of the criminal action, and the nature and structure of our punitive responses to offenders, that have been made at each of these three important decision-making sites within the criminal justice system

with the aim of identifying the values that have informed those decisions. The key issue that is addressed by this investigation is:

- which of the two dimensions of a crime is currently seen as the most important: the respect based dimension, which includes the two aspects of wrongdoing and fault, or the harm based dimension that includes the two elements of welfare and autonomy? [Chapter Eleven]

As a result of my assessment of the value judgements implicit in the decisions that we have made within our current system of criminal law I conclude that whenever we have had to choose between responding to the normative respect based aspects of a person's conduct or responding to the harmful aftermath of that conduct, we have consistently privileged the normative aspect of respect over the factual aspect of harm. Therefore, to ensure that our decisions at the sentencing stage of the criminal process are consistent with the wider practice as a whole, I will suggest that we should use the concepts of wrongdoing and fault that are associated with the normative dimension of a crime to control the extent to which the state should take the harm done by a crime into account when sentencing offenders. Consequently, in the final chapter I explain how these two concepts can be combined to construct a rule of remoteness that can provide principled limits on our sentencing responses to offenders that are consistent with the moral limits that we have imposed upon ourselves at the earlier stages of legislation and conviction.

However, while our system of criminal laws should obviously aim to be rational and consistent, this account of the decisions that we have made does not resolve all of our challenges associated with harm and the criminal law. This is because the two claims that we have made within our criminal justice system – ie, that a crime is a special kind of wrongdoing, and that the state is entitled to punish those who have been convicted of this special kind of wrongdoing – are both moral claims, and as such they must be justified and supported by morally and politically acceptable reasons. This suggestion, that our laws should not only be consistently applied and rationally structured around the concepts of wrongdoing, harm and fault, but should also be based upon morally and politically acceptable principles, leads to the final investigation that will search for the conception of justice that animates our criminal justice practice and will attempt to account for the principles that we must apply within it.

4. THE INVESTIGATION INTO THE PRINCIPLES JUSTIFYING OUR PRACTICE

The final investigation is based on the premise that we cannot devise principled rules to govern our criminal justice decision making process unless we have first understood the conception of justice embodied within our system of criminal law. This investigation into the moral heart of our criminal law reveals that it contains a fundamental and unique conception of justice that is based on our vision of ourselves as political and moral equals, living together under the protection of the state within a democratic community of equals. I conclude that this conception of justice, which is based on our vision of the good life for human beings and which requires equal treatment of equals by equals, not only places a particular and stringent duty upon each one of us within the community to respect others and to treat them as persons of equal dignity, worth and value, but also constrains the state itself to do equal justice to those whom it punishes on the grounds that they themselves have failed to do equal justice to others.

I will argue that if we accept this vision of the good life – and the conception of equal justice that is contained within it – as the principled basis for our criminal law, we do not need to adopt either of the utilitarian or the retributive accounts of the purposes of punishment or attempt any of the impossible calculations of harm, culpability or moral wrongfulness that would be imposed upon us by those theories. I conclude from this analysis that the vision contained within the equality based ‘good life’ model is powerful enough to justify most of our current practices without any reliance on other theories. In Chapter Eleven I develop an account of criminal punishment – as a choice to use harm and not as a duty to inflict harm – that allows us to reject the worst elements of both the utilitarian and retributive theories while at the same time keeping the best features of our own system intact. I suggest that we can continue to insist on proportionality and consistency in punishments without ever having to try to measure either harm, wrongdoing, punishment or its deterrent effects before we can be sure of doing justice. And I argue that to do justice to others, at each of the stages of legislation, conviction and sentencing, we must apply the principle of equal justice to limit all of our choices: to declare conduct to be criminal, to convict offenders, and to distribute punishment – or harm – on those offenders in response to the fact that they have failed to treat others as equals.

This thesis presents an account of our criminal justice decision making process that uses the two principles of ‘harm to others’ and ‘equal respect for the value of others’

to construct and justify the rules that control the state's conduct at each of the stages of legislation, conviction and sentencing. The 'good life' model of the criminal law which I develop in this thesis uses the normative respect based principle to limit the state's responses to the harm done or risked by the conduct of others. It presents us with an account of our current practices that enables us to see them not only as rational, consistent and coherent, but also as morally and politically defensible. However, while I argue that the respect based principle is the more important of the two, the analysis contained within this thesis makes it clear that our appreciation of the aspect of harm is a significant and essential part of our decision making process. This thesis shows that both the construction and the application of our rules are dependent upon our assessments of harm and the value of the different harm based interests that are affected or threatened by a person's conduct. It argues that our understanding of both of these dimensions of a crime – and an appreciation of the way that they are interdependent – is crucial to our understanding of the system of criminal justice itself. Without an understanding of the factual harm based dimension of the good life we cannot give any substance to our laws at any of the stages of legislation, conviction and sentencing; and without an appreciation of the respect based principle we cannot justify the limits imposed on the state's legislative and punitive responses in the criminal law.

PART I

THE PROBLEM OF DEFINING HARM

Chapter 1 Two Contested Concepts: Harm and the Seriousness of a Crime

- 1.1 Introduction
- 1.2 The problem of defining harm
- 1.3 The problem of defining the seriousness of a crime
- 1.4 Looking forward

Chapter 2 The Meaning of Harm

- 2.1 Defining harm
- 2.2 Expanding the definition
- 2.3 Hard Cases: comparing the tests for harm
- 2.4 The challenge of harm in the criminal law

Chapter 3 The Nature of Wrongdoing and Fault

- 3.1 Defining wrongdoing
- 3.2 Exploring the definition
- 3.3 Wrongdoing and the issue of fault
- 3.4 The value of an open definition of the concept of wrongdoing

Chapter 4 Separating Harm, Wrongdoing and Fault

- 4.1 The difference between the concepts of harm and wrongdoing
- 4.2 Separating wrongdoing from fault
- 4.3 Conclusion to Part I

Chapter One

Two Contested Concepts:

Harm and the Seriousness of a Crime

1.1 Introduction

Joel Feinberg has warned that harm is a ‘vague and ambiguous’ term containing ‘complex normative dimensions.’¹ Nicola Lacey and Celia Wells have labelled harm as a ‘notoriously difficult’ concept to apply because it is ‘indeterminate at a normative level and incomplete at an explanatory level.’² Yet despite these features, which have created such problems for academic commentators, the term appears to be used in everyday language without controversy and commonly features in sentencing judgments without giving judges, magistrates and lawyers any great difficulty or causing undue confusion in the minds of offenders. By contrast, scholarly attempts to construct a theory of harm’s role – both in the criminal law and in sentencing law – have been complicated by the continuing disagreements between those who adopt a utilitarian or consequentialist approach to the problem of harm and its relation to wrongdoing and those who insist on a deontological account of criminal conduct. Part I of this thesis explores the ordinary meaning of the concept of harm and it aims not only to identify the source of the special problems that theorists have encountered when analysing this ‘morally loaded (and essentially contested) concept’³ but to

¹ Feinberg J, *The Moral Limits of the Criminal Law, Volume 1, Harm to Others*, (Oxford University Press, 1984) at 214 (hereafter: Feinberg, *Harm to Others*).

² Lacey N & Wells C, *Reconstructing Criminal Law*, 2nd ed, (Butterworths, London, 1998) at 7. Joanne Conaghan describes harm as unstable, slippery, fluid and contentious in ‘Law, Harm and Redress: a Feminist Perspective’ (2002) 22 *Legal Studies* 319 at 322.

³ MacCormick N, *Legal Right and Social Democracy*, (Clarendon Press, Oxford, 1982) at 29; and HLA Hart, (Stanford University Press, 1981) at 153. See also Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 32-33, citing MacCormick; Feinberg J, *The Moral Limits of the Criminal Law, Volume 4, Harmless Wrongdoing*, (Oxford University Press, 1988) at 11 (hereafter: Feinberg, *Harmless Wrongdoing*). A contested concept is one that admits of different

demystify the problem of harm by explaining the distinction between harm and the closely linked concepts of fault and wrongdoing.

1.2 The problem of defining harm

There are four different approaches to the problem of defining harm that have arisen out of academic debates over the ideal structure and proper extent of the criminal law.⁴ The first suggests that the larger concept of harm extends to include either one or both of the concepts of wrongdoing and culpability (or fault); the second approach simply equates wrongdoing and harm-doing; the third argues that harm is itself a smaller component of the wider concept of wrongdoing; and the fourth emphasises that the notion of harm has been stretched so far that it can now be taken to refer to anything that we choose to prohibit by the criminal law.

The first approach takes harm to be the fulcrum of the criminal law,⁵ but adopts an extended understanding of the term that includes the concepts of wrongdoing and/or culpability within it. The most influential definition of harm emanating from this stream of analysts in recent years can be found in Joel Feinberg's discussion of John Stuart Mill's 'harm principle' in the four volumes of *The Moral Limits of the Criminal Law*. Feinberg's project was to determine what the word 'harm' must mean in order to preserve the truth of the liberal proposition that the prevention of harm to others is a morally legitimate purpose that justifies restrictive criminal legislation.⁶ He concluded that the proposition could be supported only if we adopted an extended

conceptions of its content. WB Gallie began the discussion of 'essentially contested concepts' in 'Essentially Contested Concepts' (1965) 56 *Proceedings of the Aristotelian Society* 167. For Ronald Dworkin's elaboration of Gallie's approach, see *Taking Rights Seriously*, (Duckworth, London, 1977) 103, 134-6. See also Kuklin BH, 'The Justification for Protecting Reasonable Expectations' (2001) 29 *Hofstra Law Review* 863 at 865.

⁴ Larry Alexander in 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1 at 1, suggests that there are four debates surrounding the criminal law: the justification of punishment; the theory of criminal responsibility; the nature of acts that can justifiably be criminalised; and the debate over whether harm or culpability should be the central organising principle of criminal liability. The different approaches to the problem of defining harm, wrongdoing, and culpability that are discussed in this section have been drawn from all of these related theoretical controversies.

⁵ The fulcrum analogy was introduced by Jerome Hall in *General Principles of Criminal Law*, 2nd ed, (Bobbs-Merrill, Indianapolis, 1960) at 213.

⁶ Feinberg J, 'Harm to Others - A Rejoinder' (1986) 5 *Criminal Justice Ethics* 16 at 17.

normative definition of harm as an indefensible and wrongful setback to interest, done with fault, and in violation of a person's rights.⁷

Other philosophers in this group push the definition even further by adding the idea of a breach of social bonds into the concept of criminal harm. John Kleinig has argued that 'culpable harm is a violation of a being's rights' and suggested that criminal harm is 'societal in that it destroys the trust that is the basis of the social institutions and relations that guarantee community welfare.'⁸ The tendency to include the normative concepts of either culpability or moral wrongdoing under the definition of criminal harm is not new. Jerome Hall, writing in 1943 and 1960, maintained that an assessment of the immorality of the actor's conduct was essential in the determination of criminal or 'penal' harm, which he viewed as an incorporeal 'disvalue' that includes the 'intangible social effects of the conduct as well as the moral culpability of the offender.'⁹ Richard Burgh has also emphasised the evaluative dimension of social harm. He defines it as the degree of repudiation of the value of an interest implicit in a wrongdoer's criminal conduct and argues that punishment is the way that the wrongdoer compensates society for that harm.¹⁰ These definitions, most of which have been developed in debates about the nature and proper reach of the criminal law, and which suggest that there is a special kind of 'social' or 'penal' harm

⁷ Feinberg, *Harm to Others* at 105-6, 36, 214-215, 186. So, under Feinberg's initial definition given at 105-106, one person 'harms' another person when they 1) act, 2) with fault, 3) in a morally indefensible manner, and 4) cause a set-back to the interests of that person that is also 5) a violation of their right. See also the synopsis of the first three volumes at ix-xx in Feinberg, *Harmless Wrongdoing*. Feinberg revised his final definition of harm in *Harmless Wrongdoing* at 26 (and also in 'Wrongful Life and the Counterfactual Element in Harming' (1986) 4 *Social Philosophy and Policy* 145 at 148-149) to include a sixth aspect which covers the indicating tests for harm and includes the 'counterfactual' and the 'worsening' tests, which I discuss in sections 2.2 and 2.3 of Chapter Two. I return to discuss the normative aspects of Feinberg's definition in Chapters Six and Seven.

⁸ Kleinig J, 'Criminally Harming Others' (1986) 5 *Criminal Justice Ethics* 3 at 7-9, extending his earlier position taken in 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27.

⁹ Hall J, 'Interrelations of Criminal Law and Torts' (1943) 43 *Columbia Law Review* 753 at 760; *General Principles of Criminal Law*, 2nd ed, (Bobbs-Merrill, Indianapolis, 1960) at 216-217, 242-243.

¹⁰ Burgh RW, 'Guilt, Punishment and Desert' in Schoeman F (ed), *Responsibility, Character and the Emotions*, (Cambridge University Press, 1987) 316 at 323, 330-334.

that we recognise as being caused by conduct that we characterise as criminal, will be examined in more detail in Chapter Six. However, the prevalence of these extended normative notions of harm (which make it difficult to be certain whether a criminal law theorist or a sentencing critic who refers to the harm done by a crime is intending to refer to the moral wrongfulness of a particular example of criminal conduct, to the harmful effects of that conduct, to the moral culpability of the offender, or even in some cases, to all three of these distinct aspects at the same time)¹¹ raises two important issues. The first is the issue of whether harm is in fact a normative concept as so many like Joel Feinberg and Neil MacCormick¹² have suggested or whether it should be seen instead as a purely factual or descriptive term. The second is the need to develop definitions of the concepts of harm, wrongdoing and fault, which will show us not only how to distinguish each one from the others, but which will also help us to understand the relationships between them and allow us to appreciate the distinctive nature of the role that each concept can play in the criminal law.

Another who includes the aspect of fault (but not wrongfulness) in his definition of harm is Mirko Bagaric, who, despite pursuing a ‘modern utilitarian theory of punishment’¹³ which defines the morally right action as that which maximises the net amount of happiness and minimises the amount of pain,¹⁴ also maintains that the notion of harm must include the element of culpability or fault because actions, intentions and consequences cannot be separated.¹⁵ In this respect Bagaric appears to differ from classical utilitarians like John Stuart Mill who generally take the second

¹¹ Feinberg himself switches between the normative and the non-normative uses of the word, sometimes (but not always) using quotation marks or ‘scare quotes’ to indicate the use of the extended definition. For example, see *Harm to Others* at 109: ‘excused or justified wrongdoing is not wrongdoing at all, and without wrongdoing there is no “harming” however severe the harm that might have resulted.’ Hamish Stewart, in ‘Harms, Wrongs and Set-Backs in Feinberg’s *Moral Limits of the Criminal Law*’ (2001) 5 *Buffalo Criminal Law Review* 47 at 49 notes Feinberg’s tendency to abandon his own definition. I discuss this issue in section 7.2 of Chapter Seven.

¹² MacCormick suggested in *HLA Hart*, above footnote 3 at 153 that when we decide ‘what is “harmful” to a person, we necessarily make an evaluation, and the evaluation belongs to morality’.

¹³ Bagaric M, *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001) at 7.

¹⁴ Bagaric, *Punishment and Sentencing*, above footnote 13 at 41-43.

¹⁵ Bagaric M, ‘Proportionality in Sentencing’ (2000) 12 *Current Issues in Criminal Justice* 143 at 145, 153, 161; ‘Sentencing: The Road to Nowhere’ (1999) 21 *Sydney Law Review* 597 at 619; and Bagaric, *Punishment and Sentencing*, above footnote 13 at 104-105, 186-187, 190.

approach and who define the morally wrong action simply as that action which produces a greater balance of pain over pleasure (or happiness), and who thus equate harm-doing and wrong-doing without adding any other aspect into their definition.¹⁶

The third stream of theorists reverse the approach taken by Hall, Kleinig and Feinberg. They argue that wrongdoing is the key aspect of criminal law, and include the concept of harm within their definition of the wider concept of wrongdoing. Meir Dan-Cohen defines wrongfulness as encompassing harm to welfare, harm to autonomy, or dignitary harm;¹⁷ in an echo of Aristotle, Timothy Lytton defines wrongdoing in terms of desiring or consciously promoting harm or offence;¹⁸ and Michael Moore has put forward two complex definitions of wrongdoing and wrongfulness that distinguish different roles for the moral notion of wrong that apply in different parts of the criminal law.¹⁹ Moore suggests that wrongdoing, a concept which is found in the general part of the criminal law, should be viewed as consisting

¹⁶ There is, however, a strong tendency in modern consequentialist thinking to shift from pleasure or happiness to a focus on well-being and then to define well-being in terms of both welfare outcomes and social states, which include aspects of dignity, freedom, and the way a person is treated by others. See eg, Sen A, 'Capability and Well-being' in Nussbaum MC & Sen A (eds), *The Quality of Life*, (Oxford University Press, 1993) 30; Dasgupta P, *Human Well-being and the Natural Environment*, (Oxford University Press, 2001); West R, 'Rights, Capabilities and the Good Society' (2001) 69 *Fordham Law Review* 1901. Once these shifts are complete, the differences between consequentialists and deontologists are significantly narrowed. See Bagaric's concession to this effect in the conclusion to his book *Punishment and Sentencing*, above footnote 13 at 275 where he attacks von Hirsch's approach to punishment and sentencing. I return to both Mill's and Bagaric's accounts in Part II (Bagaric in section 6.2 of Chapter Six and John Stuart Mill in section 7.3 of Chapter Seven).

¹⁷ Dan-Cohen M, 'Basic Values and the Criminal's State of Mind' (2000) 88 *California Law Review* 759 at 761, 770-772.

¹⁸ Lytton TD, 'Rules and Relationships: The Varieties of Wrongdoing in Tort Law' (1997) 28 *Seton Hall Law Review* 359 at 364. Aristotle wrote that 'if a man harms another by choice, he acts unjustly' in *The Nichomachean Ethics*, (Oxford University Press, 1998) at 127.

¹⁹ Moore MS, *Placing Blame*, (Clarendon Press, Oxford, 1997) at 33-45. A simpler version is found in 'An Exchange on the Nature of Legal Theory' (2000) 37 *San Diego Law Review* 731 at 736-737. For critique see: Lacey N, 'Book Review: Michael S Moore, *Placing Blame: A Theory of Criminal Law*' (2000) 63 *Modern Law Review* 141; Morse SJ, 'The Moral Metaphysics of Causation and Results' (2000) 88 *California Law Review* 879 at 879-880; Norrie A, *Punishment, Responsibility and Justice: A Relational Critique*, (Oxford University Press, 2000) at 95-96 and 'Michael Moore's Deviation' (1999) 19 *Oxford Journal of Legal Studies* 111.

of action and causation. It embodies a descriptive, content-neutral notion of actual harm or a bad state of affairs caused by intentional conduct. Wrongful action, which is defined in the special part of the criminal law, is a morally substantive, normative notion of what the law should contain. George Fletcher also makes a distinction between wrongfulness or 'conduct in violation of a rule of law' and wrongdoing, 'a characteristically dangerous and feared way of doing harm to others.'²⁰ These contrasting interpretations of the relationship between the three concepts of wrongdoing, harm and fault raise not only the issue of definition, but also the issue of the priority that should be accorded to each one within our criminal justice system. I will address these issues in Parts II and IV, where I will move on from the questions of definition and the identification of actual cases of harm to evaluate the importance of the roles played by each one of these concepts at each of the key decision making stages of the criminal justice system.

Commentators adopting the fourth interpretation of criminal harm suggest that the scope of the criminal law is so wide that the term harm ceases to have any real meaning as an explanatory or unifying feature. Michael Davis, in an 'impressionistic survey' of the criminal law, concluded that 'the criminal law seems to have stretched the concept of harm to breaking point.'²¹ He quoted Hyman Gross as suggesting that harm is 'any state of affairs that the law seeks to prevent.'²² This definition is similar to the early socialist definitions of criminal wrongdoing as 'any act dangerous to the Soviet system' as judged by the 'revolutionary conscience of justice.'²³ These observations point up the need to develop a test for identifying harm that can be used

²⁰ Fletcher GP, *Basic Concepts of Criminal Law*, (Oxford University Press, 1998) at 77-78.

²¹ Davis M, 'Harm and Retribution', Chapter 5 of *To Make the Punishment Fit the Crime*, (Westview Press, Boulder, 1992) at 51 (originally published in (1985) 15 *Philosophy and Public Affairs* 236). See also Scheid DE, 'Constructing a Theory of Punishment, Desert, and the Distribution of Punishments' (1997) 10 *Canadian Journal of Law and Jurisprudence* 441 at 487.

²² Davis M, 'How Much Punishment Does a Bad Samaritan Deserve?' (1996) 15 *Law and Philosophy* 93 at 100, footnote 12 citing Gross H, 'Culpability and Desert' in Feinberg J & Gross H (eds), *Philosophy of Law*, 3rd ed, (Wadsworth, Belmont, 1986) 646. See also Husak D, 'Desert, Proportionality, and the Seriousness of Drug Offences' in Ashworth A & Wasik M (eds), *Fundamentals of Sentencing Theory*, (Clarendon Press, Oxford, 1998) 187 at 208.

²³ Eser A, 'The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests' (1965) 4 *Duquesne University Law Review* 345 at 360-363; Kleinig J, 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27 at 27.

both by legislators when they determine the content of the criminal law and by judges when they sentence offenders for their crimes. Without such a test, the scope of our criminal law and the extent of our punitive responses to those who break the law cannot be subject to principled limits; if harm is anything we say it is, the reach of the criminal law cannot be checked and the law's claims to legitimacy are lost. Stephen Schulhofer thought that 'a precise definition' of the concept of harm was 'for the most part unnecessary' and, in his investigation of the proper emphasis on the results of conduct in the criminal law, he supplemented the general meaning of harm with the notion of a 'statutory harm', ie, any consequence to which the criminal law attaches significance or which is specified as a necessary element of a crime.²⁴ The important distinction that Schulhofer highlights is the one between the forbidden conduct itself and the unwanted consequences that may flow from that conduct, and this distinction between conduct and effect is one which I will discuss in more detail, both in Part I, and in Part III.

The differences between these four streams of academic thinking about the foundational concepts of harm, wrong and fault highlight the three problems that must be resolved before we can decide upon harm's proper place in our criminal justice decision making process. Not only must we settle upon *definitions* of these concepts that can attract a measure of agreement, but we must also establish more clearly the *relationships* between them and identify the *priority* of value that our current criminal law has given to each one. A consistent phenomenon that we can observe in many of the attempts to construct unifying theories of the criminal law is the tendency to conflate these three concepts together in complex, composite definitions or to define one in terms of the others. Consequently, rather than yielding any strong guidance for the role of harm in sentencing law, the debates over the legislative limits of the criminal law and the investigations of John Stuart Mill's 'simple' concept of harm,²⁵ have, unfortunately, tended to obscure and not illuminate the meaning of the term.

²⁴ Schulhofer SJ, 'Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law' (1974) 122 *University of Pennsylvania Law Review* 1497 at 1504.

²⁵ Mill JS, *On Liberty and Other Essays*, (Oxford University Press, 1998) at 13-14.

1.3 The Problem of Defining the Seriousness of a Crime

The problems of defining harm in the criminal law are paralleled by the further difficulties that we encounter when we attempt to analyse the seriousness of crimes at the sentencing stage. Although most commentators and judges currently agree that a sentence should be proportionate to the seriousness of the crime, there is much less agreement over which aspects of a crime are relevant to the assessment of its seriousness. Before he developed his extended definition of harm in 1984, Joel Feinberg argued that the seriousness of a crime should be determined by the 'amount of harm it generally causes and the degree to which people are disposed to commit it.'²⁶ Hyman Gross suggested that punishment should be determined by culpability, which he further subdivides into the four components of control, harm, dangerousness and right.²⁷ Mirko Bagaric, who maintains that the seriousness of an offence is to be gauged solely by reference to the amount of unhappiness it causes, argues that the harm caused by the offence is the only measure of a crime,²⁸ while Arnold Loewy has said that the seriousness of a crime depends on harm (the actual negative consequence occasioned by conduct), culpability (the defendant's moral blameworthiness or state of mind), and dangerousness.²⁹ Stuart Green has divided the moral content of criminal conduct into culpability, social harmfulness and moral wrongfulness,³⁰ whereas John

²⁶ 'The Expressive Function of Punishment' in *Doing and Deserving*, (Princeton University Press, 1970) at 118 (essay originally published in 1965). More recently Feinberg appears to have abandoned this formulation: see 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It' (1995) 37 *Arizona Law Review* 117 at 131-2, where he suggests that punishment should be proportionate to moral blameworthiness, which focuses only on 'culpability conditions' and includes an assessment of the harm intended or risked by the offender, but not the harm actually done.

²⁷ Gross H, 'Culpability and Desert' in Feinberg J & Gross H (eds), *Philosophy of Law*, 3rd ed, (Wadsworth, Belmont, 1986) 646 at 647.

²⁸ Bagaric, 'Proportionality in Sentencing' above footnote 15 at 145, 153, 161; 'Sentencing: The Road to Nowhere' above footnote 15 at 619. But see discussion in text at footnote 43, below.

²⁹ Loewy A, 'Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated' (1988) 66 *North Carolina Law Review* 283 at 283; see also Scheid DE, 'Book Review: *The Practice of Punishment: Towards a Theory of Restorative Justice* by Wesley Cragg' (1998) 11 *Canadian Journal of Law and Jurisprudence* 213 at 217.

³⁰ Green SP, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 43 *Emory Law Journal* 1533 at 1547.

Gardner, who maintains that wrong-doing is not reducible to harm-doing, suggests that the seriousness of a crime should be determined by the offender's wrongful action, adjusted by his blameworthiness.³¹ In a similar vein, Michael Moore argues that punishment should be proportionate to the two 'independent desert-bases' of wrongdoing and culpability.³² The Canadian *Criminal Code* requires a sentence to be proportionate to the 'gravity of the offence and the degree of responsibility of the offender'³³ and the *Criminal Justice Act* passed in the United Kingdom in 2003 following the Halliday Report, *Making Punishments Work*, provides that when considering the seriousness of an offence the court should take into account 'the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused'.³⁴

One of the most widely cited approaches, put forward by Andrew Ashworth and Andrew von Hirsch, begins with the view that criminal punishment should be proportionate to the moral blameworthiness of the offender. In arguing that the seriousness of the crime depends on two factors – the harm done by the offence, and the culpability of the offender – they appear to align themselves with the third stream of theorists identified above who define wrongdoing as encompassing harm and fault.³⁵ Their approach, which is followed in so many sentencing texts but in

³¹ Gardner J, 'Crime: In Proportion and in Perspective' in Ashworth A & Wasik M (eds), *Fundamentals of Sentencing Theory*, (Clarendon Press, Oxford, 1998) 31 at 47-48.

³² Moore, *Placing Blame*, above footnote 19 at 192. However, Moore's definition of wrongdoing functions as a synonym for harm-doing, as I explain in Chapter Six, section 6.5.

³³ *Criminal Code* RSC 1985, c C-46 (as amended 1995, c 22) Part XXIII 'Sentencing' s 718.1. For a discussion of this provision see Archibald BP, 'Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (with Ruminations on Restorative Justice)' (1998) 40 *Criminal Law Quarterly* 263; and Ruby CC, *Sentencing*, 5th ed, (Butterworths, Toronto, 1999), Chapter 1.

³⁴ *Criminal Justice Act 2003* (UK) s 143. Home Office, *Making Punishments Work*, (The Halliday Report) (2001), paragraphs 2.7 and 2.8 <<http://www.homeoffice.co.uk/cpg/halliday.htm>>.

³⁵ Ashworth A & von Hirsch A, 'Recognising Elephants: The Problem of the Custody Threshold' [1997] *Criminal Law Review* 187 at 189. See also Ashworth A, 'Is The Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225 at 240; *Sentencing and Criminal Justice*, 3rd ed, (Butterworths, London, 2000) at 123; von Hirsch A, 'Proportionate Sentences: A Desert Perspective' in Ashworth A & von Hirsch A (eds), *Principled Sentencing*, 2nd ed, (Hart Publishing, Oxford, 1998) 168 at 169; and 'Seriousness, Severity and the Living Standard' at 184 in the same

relatively few sentencing cases,³⁶ is, however, fraught with ambiguity because, as we have seen in section 1.2 above, the key terms of harm, wrong and culpability can be given different content by different writers. At times, even a single writer can use a term in different ways.³⁷ So, although this proposition appears to attract widespread agreement, differences of interpretation – and theory – often lurk beneath the surface. While harm is often used to refer simply to the effects of a crime, it is also used as an equivalent for wrong.³⁸ Some writers use neutral, content-free words expressing

volume. At times these writers suggest that the seriousness of the *wrong* depends on harm and culpability; more often they simply say that the seriousness of the *crime* depends on those two variables. I suggest that it is not helpful to use crime and wrong as interchangeable terms in the sentencing context because it allows the separate aspect of wrongdoing to slip out of view. I will argue that wrongdoing is not reducible to harm and culpability, and must be given a separate role in sentencing. See also Stewart H, 'Book Review: *Harm and Culpability*' (1997) 47 *University of Toronto Law Journal* 407 at 415; and Gardner, 'Crime: In Proportion and in Perspective' above footnote 31 at 47.

³⁶ None of the texts that identify the principle cite any cases in support of the proposition, although there is ample case law supporting the proposition that the punishment should be proportionate to the crime. Martin Wasik, *Emmins on Sentencing*, 4th ed, (Blackstone Press, London, 2001) at 54, points out that no attempt is made to define seriousness in existing case law. Regular electronic searches of Australian, English and Canadian sentencing cases using Lexis and Westlaw between 1997 and 2002 yielded only two cases that cited the principle: *Howarth* [2000] VSCA 94 at [45] where the judge, Brooking JA, cited Ashworth's text as the source of the principle; and *Lauritsen*, [2000] WASCA 203 at [35] where no authority was cited. However, late in 2002, the Guideline Judgment on rape given by the Court of Criminal Appeal in *R v Millberry*, *R v Morgan*, *R v Lackenby* [2002] EWCA Crim 2891; [2003] 2 All ER 939 cited the advice of the Sentencing Advisory Panel at [8] to the effect that 'the three dimensions' in assessing the gravity of an individual offence of rape were: the degree of harm to the victim; the level of culpability of the offender; and the level of risk posed by the offender to society. See also *Attorney-General's References* (Nos 120, 91 and 119 of 2002) [2003] EWCA Crim 05; [2003] 2 All ER 955 at [8] citing *Millberry*. The harm plus culpability formula has since been given statutory recognition in the *Criminal Justice Act 2003* (UK) s 143.

³⁷ See footnote 11 above. Nicola Lacey points out that Michael Moore, who adopts two different approaches to the notion of wrong in *Placing Blame*, above footnote 19, also appears to be unable to stick with his own distinction: see reference in footnote 19 above at 146.

³⁸ For example, Nicola Lacey interprets the formula as follows: 'the measure of punishment should reflect not only the gravity of the harm *or wrong* done ... but also the degree of culpability' in 'Social Policy, Civil Society and the Institutions of Criminal Justice' (2001) 26 *Australian Journal of Legal Philosophy* 7 at 15, emphasis added. See also 'Principles, Politics and Criminal Justice' in

degree like 'seriousness' or 'gravity' as shorthand terms for the negative concepts of harm or wrong and allow the undefined concept of crime to fill the normative gap³⁹ and sometimes other words with negative or pejorative connotations like culpability, criminality, evil, or mischief, function as substitutes for the concepts of wrongfulness or for harmfulness.⁴⁰

These varying definitions, combinations and suggested relations between the concepts of harm, wrong, fault, rights and interests, suggest that our problems with defining harm are closely linked to our difficulties in defining the nature of crime itself. By adopting these definitional strategies, we may have managed to mute our disagreements over the nature of moral wrongdoing⁴¹ and created an appearance of

Zedner L & Ashworth A (eds), *The Criminological Foundations of Penal Policy*, (Oxford University Press, 2003) 79 at 96.

³⁹ Neutral terms that express degree, like seriousness, which means 'importance, not trivial or trifling' Brown L (ed), *The New Shorter Oxford English Dictionary*, (Clarendon Press, Oxford, 1993), (hereafter SOED) at 2785, or gravity which suggests 'weightiness, seriousness or importance' (SOED at 1135) are not adequate substitutes for wrongfulness which is a negative and pejorative term. Neither is culpability a substitute for wrongfulness, see footnote 47 below, and section 4.2 of Chapter Four.

⁴⁰ For example, Jeremy Bentham commonly used 'mischief' as a supplement to his utilitarian theory of crime and punishment (see Smith KJM, *Lawyers, Legislators and Theorists*, (Clarendon Press, Oxford, 1998) at 35), just as Mill and Feinberg use 'evil'. George Fletcher, like many sentencing judges, sometimes uses the term 'criminality' to refer to overall blameworthiness: see 'Criminal Theory in the Twentieth Century' (2001) 2 *Theoretical Inquiries in Law* 265 at 275, 269.

⁴¹ Dan Kahan in 'The Secret Ambition of Deterrence' (1999) 113 *Harvard Law Review* 413, suggests that a consequentialist emphasis on deterrence allows debates over criminal justice to continue in terms that avoid passion and confrontation in circumstances where there is a profound moral dissensus within a community. He warns that this technique succeeds, but only at a cost of leaching the moral meaning out of criminal law. I suggest that a similar phenomenon can be observed in the debates over the seriousness of crimes in the sentencing literature. By burying the moral dimension of crime inside the definition of harm, theorists can avoid the appearance of making the kind of moral judgments that may create further disagreement, and can avoid the controversy over theories of value and ethics that have characterised the debates over the justification of punishment. The result of this tactic has been pointed out by Bernard Harcourt in 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109; and 'Joel Feinberg on Crime and Punishment' (2001) 5 *Buffalo Criminal Law Review* 145 at 168. Harcourt suggests that liberals, who focus solely on the 'harm principle' have cut themselves off from a moral debate over the proper limits of the criminal law and have allowed 'law and order' politicians using 'broken

consensus, but this apparent agreement that the seriousness of a ‘crime’ or the ‘blameworthiness’ of an offender depends on ‘harm’ and ‘culpability’ can be maintained in many cases, only by keeping our differences in the background,⁴² or by adopting private meanings for these key terms that ultimately sabotage the agreement that they appear to facilitate. The definitions that we use can also have the opposite effect – they can hide underlying agreement and preserve an appearance of controversy. For example, Bagaric’s seemingly bold statement that the seriousness of an offence is to be gauged solely by the net amount of harm (or unhappiness) that it causes is undermined by his view that harm includes the element of culpability.⁴³ As a result of these strategies, the essential distinction between the concepts of harm and wrong has become blurred.⁴⁴ This in turn has made it very difficult to develop clear rules governing harm’s relevance to criminal punishment, because, as we shall see, each of these two concepts has a different focus and each poses its own particular analytical challenges for sentencers.⁴⁵

windows’ arguments to hijack the debate and extend the reach of the criminal law by finding remote harms in many wrongs traditionally considered to be harmless. In ‘Joel Feinberg on Crime and Punishment’ at 167-168, he argues that this need not be a bad thing because it may force us to face the problems of measurement and weighting that are not adequately addressed in public debates. See also Feinberg’s comment in ‘Harm to Others - A Rejoinder’ (1986) 5 *Criminal Justice Ethics* 16 at 27: he had not anticipated that harm-based arguments would be used in debates over conduct that is essentially objected to on the grounds of offence or moralism.

⁴² As an example, see how John Gardner’s disagreement with von Hirsch’s definition of seriousness (‘the only thing that divides us is that I refuse to reduce all wrongdoing to harm-doing’) is highlighted only in the footnotes to his chapter in Ashworth and Wasik’s *Festschrift* for Andrew von Hirsch, *Fundamentals of Sentencing Theory*, and not in the text: see Gardner’s footnotes 22, 30 and 32, in ‘Crime: In Proportion and in Perspective’ cited at footnote 31 above.

⁴³ See above, footnotes 14 and 28. By slipping culpability into the definition of harm Bagaric brings his position into line with mainstream theorists like Ashworth and von Hirsch.

⁴⁴ Notwithstanding the fact that there is a point where these two distinct concepts meet, the equation of wrong either with harm, or with harm plus culpability, unnecessarily complicates any discussion of harm, which as a separate concept attracts a relatively high degree of community consensus by contrast with the more controversial notion of wrong: see references in footnote 102, below.

⁴⁵ This confusing linkage of harm with wrong may explain why judges have not rushed to adopt academic guidance on this matter.

1.4 Looking forward

One of my aims in this thesis is to resolve the two problems of defining harm and conceptualising the seriousness of a crime. I want to suggest that the most highly contested and complex normative aspects that have plagued our debates over the content of the criminal law and John Stuart Mill's 'harm principle' lie not in the component of harm (which, I will argue, should be seen as a relatively straightforward factual concept) but in the crucial normative aspects of wrongdoing and fault and their relationship to harm within the criminal law. However, although the issue of wrongdoing, in particular, poses great difficulties for legislators, I will argue that once those legislators have made their decision, the concept of wrongdoing, far from being a source of difficulty, can in fact become part of the solution to the sentencing problems posed by harm. I will also attempt to demonstrate that the general statement that 'the seriousness of a crime depends on harm and culpability' is ambiguous and incomplete: either because it expressly excludes the aspect of wrongfulness altogether (eg, the approach taken by Bagaric); or because it reduces wrongdoing to the two elements of harm and culpability⁴⁶ (eg, the modern retributivist or 'just deserts' approach of von Hirsch and Ashworth); or because it buries the notion of wrong inside the concept of harm (as liberals like Feinberg have done). Although the three aspects of wrongful conduct, harmful effects and individual fault are closely related, the examples given in the next three chapters will show that none of these concepts needs to be defined in terms of the others and will demonstrate that an understanding of the distinctions between them is necessary before we can account fully for the meaning that is given to the concept of crime itself. Consequently, I will argue that each of these three aspects must be given a distinct place when we are assessing issues of criminal punishment and that the only composite concept that should remain is the unavoidably complex concept of crime itself.

This approach to conceptualising the aspects of the seriousness of a crime gives rise to a further benefit. Once we have untangled wrongdoing and fault from the notion of harm, these aspects can then serve as independent sources of principles that can control the extent to which the state is entitled to take the harmful effects of a crime into account when punishing an offender. It is only after we have resolved the questions of the definition of harm and its place in the criminal law that we can move

⁴⁶ For similar views see Stewart, footnote 35 above; and Gardner, footnote 31 above.

on to tackle the issue of remoteness of harm. Given that many academic discussions include the concept of wrongfulness and fault (or culpability)⁴⁷ within the definition of criminal harm, the next three chapters will deal in detail with the distinctions between these three aspects of the seriousness of a crime and outline the relations between them. However, the remaining chapters of the thesis will deal solely with the issues arising from the core notion of harm, which I define in the context of the criminal law as the adverse effect of an offender's conduct that makes something or someone worse off than they were before the event.

The remaining chapters of Part I will analyse the ordinary, everyday meaning of the three concepts of harm, wrongdoing, and fault. This approach is based on the analytical philosophy of Ludwig Wittgenstein who argued that the way to find the meaning of a word is to observe how it is used in the language.⁴⁸ This analysis aims to identify the sources of difficulty that are associated with these three concepts and to clarify the relation between them. It will also speculate upon the ways that each of these concepts may be used to give structure to the sentencing decision. Having established a starting point upon which we can agree and settled upon definitions of harm, wrongdoing and fault that are based on the ordinary usage of these three terms, I move on in Part II to consider the ways that these concepts have been defined in the

⁴⁷ Although the discussion to this point has used the term culpability as well as fault, I prefer to use the term fault for the model that is presented in Part IV. The concept of culpability, with its overtones of blameworthiness, connotations of legal responsibility and eligibility for punishment is too broad and ambiguous to offer the kind of precise guidance that I suggest is better found in the concept of fault. For similar views see also Kyron Huigens in 'Rethinking the Penalty Phase' (2000) 32 *Arizona State Law Journal* 1195 at 1238; 'Solving the Apprendi Puzzle' (2002) 90 *Georgetown Law Journal* 387 in his footnote 203 at 419-420; and 'The Dead End of Deterrence, and Beyond' (2000) 41 *William and Mary Law Review* 943 in his footnote 38 at 951. David Owen suggests that these terms often operate as a cognate to wrongdoing in 'Philosophical Foundations of Fault in Tort Law' in Owen D (ed), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995) 201 at 201, and the difficulties that these overlapping terms can cause are illustrated in the debate between Barbara Hudson and Neil Hutton over the issue of social disadvantage. Hudson suggests that Hutton has confused the three concepts of culpability, responsibility and blameworthiness: see Hudson B, 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' (1999) 8 *Social and Legal Studies* 583 at 583; and Hutton N, 'Sentencing, Inequality and Justice' (1999) 8 *Social and Legal Studies* 571.

⁴⁸ See my discussion in the Introduction to this thesis, text at footnotes 27-30.

philosophy of the criminal law where we find the extended, normative definitions in operation.

Chapters Six and Seven consider whether we should abandon the ordinary meaning of harm and adopt any of the special normative interpretations offered by philosophers. They will consider three linked issues: the debate over John Stuart Mill's harm principle; Feinberg's extended normative interpretation of harm; and the attempts by a range of philosophers to identify a special public or social harm that can be recognised as being caused by those kinds of conduct that we classify as crimes. I will argue that these three issues can be understood more clearly if we recognise that they represent an (ultimately unhelpful) attempt to solve the difficult normative problem of what to do about wrongdoing by fusing it to the less complicated factual issue of harm, and will suggest that once we see more clearly the differences between the normative concepts of wrongdoing and fault and the factual concept of harm we will understand better how to solve both the legislative and the sentencing problems that these philosophers have attempted to address.

Part III of the thesis will move on from the questions of the meaning and the seriousness of a crime and apply the definition of harm developed in Chapter Two to actual cases in order to give factual content to the concept and to construct a catalogue of harms which may be relevant to our legislative and sentencing decisions. Part IV constructs a model of the criminal law based on the three elements of the good life for human beings – which I will suggest in Chapter Eight are our welfare, our autonomy and our desire to be respected by others as an equal – by relating those elements to the three aspects of a crime, namely, harm wrongdoing and fault. In Chapter Eleven I will use this model of a crime to evaluate the relative importance of the roles played by the three aspects of harm, wrongdoing and fault at each of the three different decision making stages in the criminal justice process. This final part of the thesis will examine the way that the three concepts of wrongdoing, harm, and fault might be combined to yield clear, consistent and principled rules that can structure our approach to legislating the content of the criminal law, convicting offenders and assessing criminal punishment. This model is based on accepting the fact that in over two thousand years of debate we have not yet reached agreement on any overriding purpose of punishment or on matters of underlying criminal law theory. I will argue that rather than continuing to search for the one master theory of value that will then dictate the content of our criminal justice system as a matter of pure logic, we should

instead adopt a model that is based on our shared understanding of the ordinary meaning of the three key aspects of harm, wrongdoing, and fault and our shared agreement over the fundamental elements of a good life for human beings living together as a community of equals. My model is designed to give full play to the core values that animate our criminal laws as they currently exist and to show that we can arrive at a satisfying and coherent theory of harm's place, both in the criminal law and in sentencing law, without first having to resolve the debates between retributivists and utilitarians over the nature of wrongdoing, or settling upon a controlling purpose of punishment.⁴⁹

⁴⁹ See discussion and references in section (c) of the Introduction to this thesis explaining the research approach upon which it is based.

Chapter Two

The Meaning of Harm

2.1 Defining harm

The word harm in its natural sense⁵⁰ can refer either to an action or to an effect; it can be used as a noun or as a verb. The dictionary defines the noun as meaning ‘hurt, injury [or] damage’ and the verb as the act of injuring or doing harm or damage.⁵¹ Ordinarily, before we can describe something as having been harmed, we must first establish that it has been made worse off in some tangible or intangible way by an act or an event,⁵² and before we can conclude that an event was harmful we must identify the facts showing that it has either permanently or temporarily made something – a person, an object (animate or inanimate), a place, a community, an institution, or a state – worse off.⁵³ So, the concept of harm in its everyday sense can be defined as the

⁵⁰ I use the term ‘natural’ here to distinguish the everyday meaning of harm from the extended normative meanings given to the term in legal theory. I do not use the word natural in the philosophical sense or mean to suggest that words have ‘natural’ meanings, see Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 454-458.

⁵¹ *SOED* at 1191.

⁵² I use the term ‘event’ here in its natural sense to refer to an occurrence, an incident, or anything that happens, rather than in the technical sense sometimes used in the criminal law. See Blackwood J, ‘Humpty Dumpty was Pushed off the Wall, Humpty Dumpty Died From the Fall: An Accidental Death or Manslaughter in Tasmania?’ (1996) 15 *University of Tasmania Law Review* 306 discussing s13(1) of the *Tasmanian Criminal Code* and s23(1) of the *Criminal Codes* of Western Australia and Queensland, where a chance ‘event’ or an ‘event which occurs by accident’ has been interpreted by the courts as a ‘consequence or result of an action’.

⁵³ See: Feinberg, *Harm to Others* at 103 and *Harm to Self* at x-xj; Kleinig J, ‘Crime and the Concept of Harm’ (1978) 15 *American Philosophical Quarterly* 27 at 32; Thomson JJ, *The Realm of Rights*, (Harvard University Press, 1990) at 261-263; Hampton J, ‘Correcting Harms Versus Righting Wrongs’ (1992) 39 *University of California at Los Angeles Law Review* 1659 at 1662; Raz J, ‘Autonomy, Toleration and the Harm Principle’ in Gavison R (ed), *Issues in Contemporary Legal Philosophy*, (Clarendon Press, Oxford, 1987) 313 at 329 and *The Morality of Freedom* (Clarendon Press, Oxford, 1986) at 414; von Hirsch A & Jareborg N, ‘Gauging Criminal Harm: A Living-Standard Analysis’ (1991) 11 *Oxford Journal of Legal Studies* 1 at 11; Simester AP & von Hirsch A, ‘Rethinking the Offense Principle’ (2002) 8 *Legal Theory* 269 at 280-281; Shiffrin SV, ‘Wrongful Life, Procreative Responsibility, and the Significance of Harm’ (1999) 5 *Legal Theory*

adverse effect of an event that has made something or someone worse off than they were before the event.⁵⁴ This definition highlights four elements, each of which requires further elaboration if the full complexity of the problem of harm and its essentially factual nature are to be fully appreciated:

- an adverse effect
- of an event
- that makes something or someone
- worse off than they were before the event.

The requirement of an ‘adverse effect’ means that we need to be able to identify and categorise the kinds of harm that can be caused and find a way to distinguish harmful effects from other adverse effects like offence, disgust or mere irritation. The notion of a causative ‘event’ requires an examination of the ways that harm can arise; and the two requirements that ‘something or someone’ be made ‘worse off’ than they were before the event occurred means not only that we need to identify the kinds of things that can be harmed but also that we have to devise a process that tells us how to test for harm. Each of these four aspects that amplify the everyday meaning of the concept of harm will be discussed in more detail in the remainder of this chapter.

The kinds of events that lead to harm are as varied as the range of things that can be harmed. Harm can be self-inflicted, it can be inflicted by another person or an animal, or sometimes it can be caused by the action of either a natural force, a natural process, an historical event, or even by one or more of these factors combined, as the following examples illustrate.

Self-inflicted harm: ‘She did herself serious bodily harm by deliberately putting her hand into the fire.’

‘Everyone thought that Nigel’s mad antics and drunken behaviour at the office party had harmed his prospects of promotion.’

Harm resulting from the conduct of others: ‘The doctor’s failure to administer the antidote early enough harmed the patient’s chances of survival.’

117 at 122. Many of these commentators begin with an account of harm that is based on the notion of being made worse off, but then add extra normative dimensions to the concept. I discuss their definitions in Chapter Six.

⁵⁴ The corresponding verb ‘to harm’ would refer to the conduct or action that makes something worse off than it previously was.

‘The leading candidate for the position complained that he had been harmed by the personnel manager’s selective leaking of crucial information to other applicants.’

Natural forces: ‘The harm to the foreshore was caused in February by the action of the waves combined with the blistering heat and the driving winds.’

‘The cyclone that hit Darwin on Christmas Eve did untold harm, not only to the city itself, but also to the lives of those who experienced its devastating power.’

Natural or bodily processes: ‘Warning: prolonged use of this medication can cause harm – known side-effects include muscular tenderness and pain on breathing.’

‘Australians in the outback are particularly at risk of harm from constant exposure to the sun’s cancer-causing ultra-violet radiation.’

Historical events: ‘The dollar’s failure to reach its former value resulted in long lasting harm to the banking industry.’

‘The unexpected retirement of their key goal-scorer on the eve of the Games has harmed Australia’s chances of retaining the gold medal.’

‘Although the lost children were wandering in dense bushland for over 24 hours, they came to no great harm.’

‘When commenting on the aftermath of the Chinese government’s crackdown on student protests, the Ambassador suggested that any harm done to his country’s international reputation could easily be repaired.’

These examples drawn from common usage show that any inquiry into harm can potentially have a very wide scope because, although the paradigm case of causing harm is a physical event that causes physical damage, harm can be manifested not only in the tangible, physical world, but also in intangible ways, as for example, when someone’s reputation, chances of success, or expectations are diminished or destroyed. Furthermore, these effects can be either permanent or temporary. Another complicating aspect is the fact that harm can be the result of a range of events, which, it appears from its everyday connotation, can include various non-doings or omissions. The definition of an ‘event’ as something that ‘happens or is *thought of as happening*’⁵⁵ is wide enough to include omissions and it highlights the important element of human selection, choice and interpretation in these matters. John Fleming

⁵⁵ *SOED* at 865, my emphasis.

has argued that an omission is not an event,⁵⁶ but, even though an omission may well be a non-doing, it can nevertheless be interpreted as an event, ie, as something that is thought of as happening. This is why we can normally say, without speaking nonsense, that the failure of the gardener to water the garden caused the flowers to die, or that the failure of the signalman to pull the switch derailed the train.⁵⁷ I will discuss the issue of omissions and whether they can be seen as causing harm in more detail in section 2.3 and again in section 11.2 of Chapter Eleven.

An important feature of humanly caused harm is that it is almost always the result of 'external conduct' or physical actions (or in some cases, a failure to do a physical act). Only rarely can harm be the result of mere thoughts or 'internal conduct'⁵⁸ alone. It seems to be theoretically possible to harm oneself purely by thinking (for example, by continually dwelling on unhealthy or depressing ideas) but it does not seem to be possible to harm other physical beings or objects in this way.⁵⁹ However, although it appears that we cannot harm other people or objects unless our thoughts are given physical expression through external conduct, once an event has occurred, the consequential harm can nevertheless be manifested purely in the intangible realm.

Regardless of whether the effect is tangible or intangible, the concept of harm has an in-built temporal, comparative and quantitative aspect that requires us to contrast the state of something before and after an event in order to show that the event has led to a negative change that has made it worse off in some way. I suggest that ordinary usage shows that the shift may relate to three different kinds of negative change, each one focusing on a particular conceptual comparison which establishes that harm has occurred. The first looks for changes to actual states of existence; the second focuses

⁵⁶ Fleming JG, *The Law of Torts*, 9th ed, (LBC Information Services, Sydney, 1998) at 220. See also references and discussion at footnote 107 below.

⁵⁷ See Hart HLA & Honore T, *Causation in the Law*, 2nd ed, (Clarendon Press, Oxford, 1985) at 38 for further discussion of these examples. This apparently simple conclusion is a shorthand way of referring to a number of subsidiary assumptions about the way that the conduct has deviated in some way from the normally expected course of events.

⁵⁸ Herbert Morris contrasts law's concerns with 'external conduct' with morality's concern for 'internal conduct' in 'Punishment of Thoughts' in Summers RS (ed), *Essays in Legal Philosophy*, (Basil Blackwell, Oxford, 1970) 95. We can contrast harming with wronging in this respect because it is possible to wrong someone either in thoughts or in deeds: see section 3.2 of Chapter Three.

⁵⁹ Psychic spoon-bending or the effective casting of spells must be considered impossible.

on changes in expectations; and the third (which is really a special sub-class of the second category) requires us to assess the change in one person's competitive position relative to others. Each of these three categories of negative or adverse effects will be examined in the following section.

2.2 Expanding the definition

The first and most straightforward inquiry when testing for harm requires a comparison of a previously existing state with a later state, and its aim is to identify a negative shift in either a tangible or an intangible aspect, for example, someone's physical state, financial circumstances or reputation. A person who had lost a \$50 note could demonstrate by simple arithmetic the extent to which they had been made worse off, whereas someone who claims to have been defamed would have to show how their reputation had been lowered in the eyes of others. In a case of a motor vehicle accident, we would compare the person's actual state before and after the collision and, if we detected a worsening of their condition, for example, burns injuries or broken bones, we could conclude that harm had occurred. If any psychological disability or financial losses followed the initial physical injuries we would also view these effects as harmful. Interestingly, our view that the victim had been harmed by the collision would not be displaced even if the victim eventually made a complete recovery. This observation suggests not only that the chosen points of comparison are important in our judgements about harm, but also that we do not always defer to the long-term perspective when characterising the event itself. Where a harmful event causes only a temporary worsening of condition, it is not a contradiction to say that the event was harmful, and then to add that there was no long-term harm done. In this respect, I disagree with Paul Robinson who suggests that we do tend to orient our thinking towards the ultimate endpoint rather than any intermediate harm.⁶⁰ His point may hold true when we consider harm in the legal

⁶⁰ Robinson PH, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *University of California at Los Angeles Law Review* 266 in his footnote 7 at 267. Christian Witting in 'Physical Damage in Negligence' (2002) 61 *Cambridge Law Journal* 189 discusses the argument presented in the case of *Macfarlane v Tayside Health Board* [2002] 2 AC 59 (a sterilisation case where negligent advice led to the birth of a healthy child) where it was argued that, because the pains of childbirth are temporary and because childbirth is a natural bodily process, which a woman's body is 'designed to induce and accommodate' and from which a

context (for example, when a person must choose between two harmful courses of action)⁶¹ but in ordinary life our conclusions about harm exhibit a degree of double-think that can challenge our attempts to construct simple rules for judging conduct.

This curiously recurring feature of our thinking about harm has posed difficulties for Joel Feinberg, who, despite adopting an extended normative definition of harm, sometimes treats harm in its more everyday sense as a purely quantitative matter.⁶² In *Harm to Others*, Feinberg used a linear image of an ‘interest graph’ or chart that shows how we might track any overall advances or reversals of someone’s condition.⁶³ However, as we saw above, a person can also be harmed in their expectations, and in these cases the image of a graph is not particularly helpful, unless, in addition to marking changes in existing states, we can also find a way to plot changes in expected future states onto it as well. So, for example, if an event occurred that prevented two parents from paying a promised \$50 to their children, we would still classify it as having harmed the children despite the objection that, if we followed the first approach to assessing harm, we would have to conclude that the children’s actual financial situation had not worsened in net terms. They started with nothing and they ended with nothing. But this view, which limits our consideration to a worsening of actual states and excludes any consideration of expectations, is unnecessarily restricted and conflicts with natural (and legal) usage.⁶⁴ Again we can say, without contradicting ourselves, that while the children had not been made worse

woman’s body recovers, it cannot be seen as a disruption to the organic functioning of a woman’s body, and hence should not be seen as a deleterious physical change – or harm.

⁶¹ See my discussion below, text at footnote 85.

⁶² There are parts in *Harm to Others* where Feinberg abandons his extended normative definition of harm and focuses on the non-normative sense of harm as a setback to an interest and it is here that he draws the analogy with a business ledger or bank account. See *Harm to Others* at 53-54, and his Chapter 4, ‘Failures to Prevent Harm’.

⁶³ See Feinberg, *Harm to Others* at 53 and also ‘Wrongful Life and the Counterfactual Element in Harming’ (1986) 4 *Social Philosophy and Policy* 145 at 147.

⁶⁴ See also Raz J, *The Morality of Freedom*, above footnote 53 at 416; ‘Autonomy, Toleration and the Harm Principle’ above footnote 53 at 327 for a similar view. It also conflicts with legal usage; the protection of reasonable expectations is a familiar principle in many areas of the law, eg contract law and administrative law, and in fact it has been suggested by Roscoe Pound and others, that it underpins all of the law: see Kuklin BH, ‘The Justification for Protecting Reasonable Expectations’ (2001) 29 *Hofstra Law Review* 863, for a brief overview.

off in actual terms, they were nevertheless made worse off in another way, namely, in terms of their expectations.

Further complications occur if an expected benefit turns out to be less than was expected. If a stock-market crash resulted in a man, who was about to retire with a guaranteed lump sum superannuation payment of \$500 000, being reduced to a sum of only \$100 000, this event could also be classified as harmful, despite the fact that his status on his 'interest graph' would actually rise after the revised sum of \$100 000 was paid. Even if his financial circumstances actually improved after the payment, we would still conclude that he was worse off by \$400 000 as a result of the crash. The difference between these two pairs of examples lies in the nature of the negative change that establishes harm and in our characterisation of the causative event. In the children's case, their actual financial circumstances remained stable throughout, but the event had the consequence that they failed to receive the full total of an expected benefit. In the superannuation case, the expected benefit was only partially reduced and so although it improved the retiree's actual financial state, it too failed to match up to expectations. These two cases can be contrasted with the other two more straightforward examples, which involved cases of actual financial loss and actual physical damage, and where no issue of expectations arose to complicate matters.

It is also important to note that a person can be harmed without knowing it. This applies both to a person's actual state as well as to their expectations. So, regardless of whether the children or the retiree were actually aware of the events or their effects, an external observer would conclude that both events were harmful. This means that we do not have to establish that a person has subjectively experienced an actual *sense* of expectation before we can conclude that they have been made worse off in terms of their expectations. Conversely, a person might believe that they have been harmed, but be mistaken in their beliefs. In this sense then, the concept of expectations as it is used in this thesis carries an objective, almost actuarial connotation⁶⁵ that requires us to assess the strength of a person's legitimate expectations from the point of view of an external rational observer with full

⁶⁵ I am grateful to my colleague Michael Stokes for his suggestion that we might use the term actuarial to encapsulate this sense of legitimate expectations. Given that this thesis aims to explain harm's role in the criminal law, the emphasis on the fact that legitimate expectations should be externally assessed and not limited only to subjectively experienced states is particularly important.

knowledge rather than basing our assessment either on the actual conclusions drawn by the participants themselves or on their subjectively experienced sense of having being harmed.⁶⁶

All of these examples demonstrate that we make fine distinctions between actual states and expectations of future states when considering the issue of harm. They also show that while the concept does have a distinctly quantitative or factual character, the process of assessing harm cannot be reduced to a mere summing exercise that is designed to yield a single right answer. This is not only because harm can be short-lived and because we can suffer harm in qualitatively different respects, but also because we can have current expectations of future states that augment and go beyond our currently existing states, a point that Feinberg's purely linear image of harm (and harmed states) cannot cater for. These facts lead to the paradox that an analysis of any one particular event can sometimes give rise to two correct, but apparently contradictory, conclusions that harm both has, and has not, occurred. My point is that in everyday life we should not try to resolve this apparent paradox because it tells us something important about the complex results of the event that has taken place.⁶⁷ By contrast, the summing approach obscures the fact that an event may have both positive and negative outcomes and it can lead us perilously close to accepting that the ends justify the means.

Once we move from comparing actual states of existence to comparing expectations, Feinberg's model ceases to offer a helpful guide to the assessment of harm. We could perhaps conceive of a person as having two 'interest graphs', one covering their actual states of existence and the other tracking their expectations, however, this approach would not provide a solution, because although a person's actual course through life takes only one path, human beings have the capacity to envision many alternative possibilities for the future. The significance of expectations in the daily lives of human beings should be reflected in our assessments of harm because our expectations of the future inform our decisions and affect our conduct in

⁶⁶ Of course, the victims' subjective experiences will be relevant to our calculations, but they cannot determine the issue. If the victim's experience of harm determined the question of harm, we could not describe as harmful an event that had instantly rendered a person permanently comatose.

⁶⁷ The problem of punishment exemplifies this paradox. We may agree that, on balance, the institution of state punishment is a necessary one, but the fact that it can be justified should not lead to the conclusion that it does no harm.

the present. In the superannuation case, for example, the retiree may have relied on his expectations by contracting to buy a house or by borrowing money to start a retirement project, thereby making his circumstances all the more precarious when the crash reduced his final payout. This human ability to imagine and to plan for the future further complicates our thinking about harm and forces us, not only to take expectations into account, but also to make objective judgements as to which expectations are legitimate enough to qualify as a realistic and relevant source of comparison.

A more difficult example involving both omissions and multiple expectations would be the failure of a doctor to administer a timely life saving antidote to a patient suffering from a deadly snakebite. If the patient would certainly have survived if the antidote had been given in time, we might tend intuitively to agree that the doctor's conduct in failing to give the antidote had harmed her chances of survival – even though she would certainly have died if nature had taken its course and nothing had been done to intervene in that process. This case highlights the familiar problem of multiple causes. A particular state of harm may have been the product of more than one prior event, and, while this does not normally pose a problem in everyday life, it does give rise to legal problems when we must decide questions of criminal responsibility, civil liability and the quantum of punishment or civil damages.⁶⁸ The matter of multiple expectations is less often recognised by commentators (particularly those who adopt the linear summing approach to assessing harm), but it may help us to resolve these complicated cases if we use the natural meaning of harm as a guide and track not only the changes – or negative shifts – in the actual state of the victims after each event, but also track any changes in expectations as well.

The first step is to recognise that the natural meaning of harm, as the adverse effect of an event that has made something worse off in some way, allows the inquiry a wide scope. As we saw above, these causally relevant events can include human or animal conduct, natural forces, natural processes, or historical events. In the case of 'Snakebite' there are four relevant events: the first is the snakebite; the second is the

⁶⁸ Feinberg discusses some of these issues in 'Wrongful Life and the Counterfactual Element in Harming' above footnote 63 and discusses failures to prevent harm or to confer benefits in Chapter 4 of *Harm to Others*. Hart & Honore, *Causation in the Law*, above footnote 57, discuss causation in the criminal law, including multiple causes at 325-362.

victim's request for the antidote at the hospital; the third is the doctor's conduct in failing to administer the antidote; and the fourth is the death of the patient. The second step is to recognise that when we ask the general question as to whether the patient was harmed, we are in fact asking two questions that require parallel, but separate, analysis. In this case there are two relevant categories of harm to consider: the patient's actual state of existence; and her legitimate expectations of the future, as objectively assessed. The way that each successive event has affected this patient is summarised in Table 2.1, where the negative shifts are marked with an arrow.

TABLE 2.1 SNAKEBITE [Premise: timely administration of the available antidote would have saved the patient.]		
Event	Actual Physical State	Legitimate Expectation
1. The snakebite occurs.	(a) fit and healthy ↓	(A) ordinary life expectancy ↓
2. Victim attends hospital and requests antidote.	(b) mortally sick from venom	(B) death (from venom)
3. Doctor fails to give antidote in time.	(c) mortally sick from venom	(C) life ↓
4. Patient dies.	(d) mortally sick from venom ↓ (e) dead from venom	(D) death (from venom) (E) –

The reason why these cases give rise to debate lies between the points (c) and (d) when the doctor fails to give the antidote. Usually in these cases we are not arguing about how to respond to the snake – it is the conduct (and the fate) of the doctor that preoccupies us. But if we focus on the immediate result of the doctor's conduct and compare only the victim's actual physical state before and after he fails to give the antidote, it appears that his conduct had no adverse effect on her at all. She was mortally sick from the venom both before and immediately after this event. Furthermore, the snake venom was enough on its own to kill her and was in fact the thing that accounted for her actual death. Yet the conclusion that he did no harm seems counter-intuitive, and so, to complete our understanding of these events, we need to expand our focus and consider not only the changes in the patient's actual physical state but also the changes in her expectations.

Before the snakebite occurred, the healthy patient had a legitimate expectation of continued normal life. After the snake had bitten her, she became mortally sick and had an immediate expectation of death and so we can establish, by comparing the negative shifts from (a) to (b) and from (A) to (B), that the snakebite harmed her in both respects. However, once the victim requested the antidote at the hospital, her objective expectation of death was displaced by a legitimate expectation of a positive outcome because of the doctor's positive duty to treat her with the life saving antidote. But when he did not do so, her expectation of life was worsened and for a second time her expectation was of death from the venom.⁶⁹ It is this worsening of expectations in the shift from (C) to (D) that allows us to conclude that the doctor's conduct harmed the patient. Significantly, the doctor's conduct in this case is an omission, but this does not prevent us from drawing the conclusion that the event, constituted by his omission, was harmful. But the conclusion that the doctor had harmed the patient in this way does not, on its own, lead to the conclusion that his conduct caused her actual death. The general question 'Did the doctor harm the patient?' is easily answered once we identify the negative shift in her legitimate expectations, but the specific question 'Did the doctor cause the particular harm of this patient's death?'⁷⁰ requires a more complicated analysis. Further comparisons need to be made before that conclusion can be drawn, and it is at this point that the full advantages of this double faceted approach to testing for harm are revealed and the essentially factual nature of the process of testing for harm is exposed.

If we compare the patient's expectation at (C), which was life, with her actual state at (e), which was death, we can conclude that the doctor's failure to give the antidote made a significant difference to the patient's actual fate. Furthermore, the expectation of death from the venom at (D) that was created anew by the doctor's conduct crystallised into reality when the patient died from the venom at (e). I want to suggest

⁶⁹ Once we accept that the displacement of expectations has taken place and focus on how the doctor's conduct in failing to give the antidote destroyed her expectation of life, this case begins to resemble the children's case discussed above where an expected benefit failed to materialise. The significant difference between the two cases is that the children's financial situation remained stable, whereas in the snakebite case the patient's situation was worsening towards death. This makes the failure of the expected benefit all the more serious.

⁷⁰ I am assuming for the purposes of this factual example that death is a harm. Some have doubted this proposition, and I discuss this issue in section 9.2 of Chapter Nine.

that these two conclusions, when combined with the already established fact that the doctor (D) had harmed the patient (V), allow us to determine that the doctor's conduct caused her death because these three pieces of information together sum up all that we try to convey when we come to the judgement that some human conduct was the cause of some particular, specified harm. They are:

- that D has harmed P, as evidenced by the negative shift between (C) and (D);
- that D's conduct made a significant difference to P's final fate, as evidenced by the negative shift between her expectation of life created at (C) when she requested him to give her the antidote and her actual death at (e); and finally
- that the expectation of the kind of harm (death by snake venom) that his conduct created at (D) did in fact crystallise into reality at (e).

These three essentially factual conclusions are enough to lay a valid foundation for the further normative inquiries into whether the doctor should be held to be legally or morally responsible for this state of affairs. These questions would require an inquiry into the matter of wrongdoing (which might be established by showing that the doctor was in breach of his duty to treat the patient) and the issue of fault or attribution (which would involve finding out the reasons why he did not administer the antidote in time). These two concepts and their relation to the concept of harm will be discussed in Chapters Three and Four and in section 2.3 I will explore the way that a focus on the meaning of the concept of *harm* (as opposed to the more usual theoretical focus on the meaning of the concept of *causation*) can yield a better approach to the problems of the causing of harm and the fair attribution of criminal responsibility for acts of harm, both in the criminal law and, as I will show in Part IV, in sentencing law as well. The point that I want to emphasise here, however, is that the test for harm is essentially a factual one, and it is one which often requires us to consider not only facts about actual states, but facts about expectations as well. It is only later, when we must decide how we should respond to an act of harming that we might want to take the further step of characterising its moral quality, and it is only at that point where the normative or moral aspects enter into our debates about harming.

The difficulties and counter-intuitive results that can arise when analysing complex events using a test that focuses only on a worsening of actual states illustrates the reasons why, two years after *Harm to Others* was published, Feinberg's perception of the limitations of the 'historical measure' or 'worse off' test led him to develop a broader 'counterfactual test' which he built into his definition of 'harm to others'.

This test requires us to ask whether the victim's condition would have been worse had the impugned event not occurred.⁷¹ However, because of the difficulties posed by cases of causal over-determination that were not solved by this 'but for' approach,⁷² Feinberg was led to modify it once again. His final definition of harm specified: a faulty, indefensible act that is the cause of an adverse effect on another, that is also a violation of that person's right, and which leaves the person 'worse off than he would be otherwise in the normal course of events insofar as they were reasonably foreseeable in the circumstances.'⁷³ But if we are seeking a simple definition that can explain the essential meaning of the concept of harm and can differentiate it from the other key concepts of wrongdoing and fault, this expanded definition is unnecessarily overloaded with factors that are designed to help us resolve the question of when is it right to hold someone legally accountable for the harm that they have done to others.

As we shall see in Part II, many of Feinberg's glosses on the concept of harm⁷⁴ are directly related to his notion of harm as a wrongful invasion of a person's rights and to his attempts to derive a definition of 'harm to another' which is comprehensive enough to cover all cases thought to be appropriate to the imposition of criminal (and civil) liability and which solves the legal problems associated with the fair attribution of responsibility for harmful wrongdoing at the same time.⁷⁵ These wider aims may account for his dissatisfaction with the 'worsening' test. However, the discussion of the snakebite case given above demonstrates that most of our difficulties disappear,

⁷¹ Feinberg, 'Wrongful Life and the Counterfactual Element in Harming' above footnote 63 at 149-150 and *Harmless Wrongdoing* at 26. See also Thomson JJ, *The Realm of Rights*, (Harvard University Press, 1990) at 261-223; and Shiffrin SV, 'Wrongful Life, Procreative Responsibility, and the Significance of Harm' above footnote 53 at 121-123.

⁷² The case of causal over-determination that Feinberg selects is the case where someone seriously injures a man and so prevents him from continuing on a journey that, it later turns out, is doomed to utter disaster and would have led to his death. See 'Wrongful Life and the Counterfactual Element in Harming' above footnote 63 at 150-151, and *Harmless Wrongdoing* at 26-27. I discuss this case in section 2.3 at Table 2.4.

⁷³ Feinberg, 'Wrongful Life and the Counterfactual Element in Harming' above footnote 63 at 148 (basic definition) and 153 (final condition), original emphasis removed.

⁷⁴ Particularly, the elements of a setback to an interest, a violation of a right, the wrongful act requirement, and the aspect of reasonable foreseeability.

⁷⁵ In 'Wrongful Life and the Counterfactual Element' above footnote 63, Feinberg expands upon the criminal law focus of *The Moral Limits of the Criminal Law* to consider civil liability as well.

even in the difficult cases of omissions, if we simply take account of expectations as well as actual physical states when we are testing for harm. Furthermore, once we see an event in all its complexity, we are able to interpret it more easily and arrive at a more comprehensive understanding of its effects. I also want to suggest that we should not try to solve the separate normative or moral question of whether to hold a specific person responsible for causing a particular harm to another by adding extra conditions to our definition of harm. The key to solving the problem of assessing harm is not to modify the test, nor to expect a single, all-things-considered answer to the question, but to confine the test to its limits and to recognise that the one test can yield different answers because it can be applied to a number of different conceptual categories.

The third and final category of comparison requires us to compare changes in a person's competitive position relative to others. This category (which is in one sense a special sub-class of the second category) recognises that human beings perceive themselves not only as historical beings with a past and a future, but also as social and competitive beings who are in rivalry with others. As we have seen, one way of harming a person is to worsen their expectations by failing to deliver a promised benefit or by directly reducing their options for the future, but another more indirect way of reducing the strength of a person's expectations of future success is to improve the position of others with whom that person is in competition, while leaving the 'victim' as he was.

For example, in a case where eleven out of twelve applicants participating in a blind tendering process have been given the benefit of inside information, the remaining person who was excluded might claim that, because he had been made worse off by comparison with the others, he had therefore been harmed by the events. In these circumstances we would conclude that the strength of his expectations of success had been reduced by the improvement in his competitors' positions. As in some of the previous examples, the complainant's actual state has not been worsened, but he can nevertheless be seen as being worse off than he was before the event occurred because, regardless of whether he had a strong chance of success or not, the strength of his chances of success had been reduced. In these cases of competitive harms, therefore, we do not have to establish that the victims had a guaranteed expectation of actual success; all we have to do in order to establish harm is to show

that they had some chance of success which was reduced in strength as a result of the event.⁷⁶

This kind of claim – that one person has been harmed because others have been benefited – might not always be accepted, particularly where the criterion of distribution is need or disability.⁷⁷ Unequal treatment is not in itself a harm, although, as we shall see in Part IV, it may amount to a wrong. The key to the assessment of harm in these situations is first to establish that the parties are in competition and then to ascertain the basis of the competition. The characterisation of the members of a group as equal competitors is one step towards establishing that an unequal distribution of benefits is harmful. Swimming races at the Olympic Games provide an example where all competitors have an expectation of competing on equal terms. Any advantage given by the organisers to some swimmers can in those circumstances be seen as harming the chances of the remaining competitors. But in the case of the Special Olympics where the swimmers have a variety of disabilities, the competitors accept that some participants may require additional benefits in order to equalise their competitive positions. So, any difference in their treatment is seen as a recognition of the fact that they are initially competing from positions of inequality. This aspect of competitive harms is one that does not often arise in the criminal law, but I return to it briefly in Chapter Nine. The issue of unequal treatment of equals is a more complex issue, which is tied deeply to our community's conception of wrongdoing, and I will return to this issue and discuss it in greater detail in Part IV.

⁷⁶ This category really represents a variation on the second category because it is based on a change for the worse in a person's legitimate expectations. What distinguishes it from the other cases in the second category is the fact that the harm to the victim is indirectly effected by an improvement in the positions of those with whom the victim is in competition. As such it introduces an extra step in our process of comparison which warrants its retention as a special category.

⁷⁷ So, in a case where food aid is distributed to the starving, we do not perceive the benefit delivered to the needy as in any way worsening the competitive positions held by others who are not starving (if anything we see it as restoring the basic conditions of life which are themselves the pre-conditions for any kind of competition). On the other hand, we might see the selective distribution of food aid to one starving group in preference to another starving group as disappointing an expectation in the latter of an improvement in their physical state, which itself may be based on a presumption of equal treatment. The reasonableness of an expectation of rescue is a topic that I will discuss in more detail in section 11.2 (b) of Chapter Eleven.

This discussion has highlighted the temporal, comparative, relational and quantitative aspects of the concept of harm and revealed the close conceptual link between the definition of harm and the process for ascertaining whether harm has occurred. The definition itself points to the process: harm is a concept that depends on our ability to make comparisons before and after an event and identify any changes that render someone or something worse off.⁷⁸ Expectations figure strongly in our assessments of harm because of our human tendency to rely upon our imagined futures. Comparisons, not only with our own former positions, but with our competitive positions relative to others are also important in our assessments of harm because of our competitive natures and the fact that we calculate our chances of success in these ventures on the basis not only of our own capacity but also by reference to the competitive position of others. Consequently, I have argued that the test for whether a person has been harmed by an event is to ask whether they have been made worse off in either their actual state of existence, their legitimate expectations, or in their competitive position relative to others.

The problems that seem to arise when the answer to one of these inquiries contradicts the answer given to one of the others occur only if we expect a single answer to the question of harm, but they can be resolved if we abandon a mathematical or linear model of the process. Assessing harm is a matter of selection, interpretation and judgement, not a matter of summing net harms and benefits to derive a total that will direct us to the definitive answer to our inquiry. In everyday life, when we consider whether an event was harmful we often come up with two answers to the question, but this need not give any cause for concern. On the contrary, I have suggested that in some cases only an understanding of the complex and sometimes equivocal results of an event or series of events can reveal its full meaning.

⁷⁸ But see Shiffrin SV, 'Wrongful Life, Procreative Responsibility, and the Significance of Harm' above footnote 53 at 121-123, arguing that 'comparative models of harm and benefit should be reconsidered' because they fail to accommodate 'some deep asymmetries between benefits and harms'. Shiffrin proposes (at 123) a 'non-comparative account' that focuses on the 'chasm or conflict between one's will and one's experience' which she suggests is the sign of harm, however, I would argue that this also makes use of a comparative approach – one that compares one's desires with one's actual state. Historical comparisons are on my account an unavoidable element of the process for testing for harm, and consequently, while I agree with much of Shiffrin's critique of Feinberg, I disagree with her alternative account of harm.

The simple historical ‘worse off’ test has been criticised by commentators, most notably Joel Feinberg, who has suggested a more complex counterfactual test for causing harm. Feinberg’s final test for harm includes a long list of factors, each of which he suggests must be satisfied before we can say that A has harmed B:

1. A acts (in a sense wide enough to include omissions and extended sequences of activity).
2. A’s action is defective or faulty with respect to the risks it creates to B, that is it is done either with the intention of producing the consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences.
3. A’s acting in that manner is indefensible, that is, neither excusable nor justifiable
4. A’s action is the cause of an adverse effect on B’s self interest (a “state of harm”).
5. A’s action is also a violation of B’s right.
6. A’s action leaves B worse off than he would be otherwise in the normal course of events insofar as they were reasonably foreseeable in the circumstances.⁷⁹

By contrast, I have argued that all we need to do in order to show that A has harmed B is to ascertain whether A’s conduct has made B worse off either in terms of B’s actual state, B’s legitimate expectations or B’s competitive position relative to others. In the next section I will use a series of hard cases to compare this test, which has been derived from an examination of our everyday understanding of the concept of harm, with Feinberg’s counterfactual test (contained in the sixth clause of his definition) in order to see which account offers the better approach to solving practical causation problems. By comparing the two different approaches to these hard cases I also hope to demonstrate that any examination of the question of harm is essentially a factual and not a normative process and to explain how this understanding can assist us in the criminal law when we must settle upon a fair way, first to decide whether any given harm has been caused by an offender’s criminal conduct, and secondly whether it is fair to take it into account when convicting and sentencing the offender for that conduct. I will argue that the ‘worse off’ test offers better guidance for answering the factual part of the enquiry, and I will suggest in Part IV that we must turn to the other concepts of wrongdoing and fault to find our

⁷⁹ Feinberg, ‘Wrongful Life and the Counterfactual Element in Harming’ above footnote 63 at 148 (for the first five clauses) and (for the final version of clause 6) at 153. See also *Harmless Wrongdoing* at 26. An earlier five part definition, which is similar to the final definition, appears in *Harm to Others* at 105-106.

answers to the second part of the enquiry. However, before turning to those hard cases, I will summarise the four key elements of the definition of harm in Table 2.2, below.

TABLE 2.2 EXPANDING THE DEFINITION OF HARM	
DEFINITION:	Harm is the adverse effect of an event that makes something or someone worse off than they were before the event.
KEY ELEMENTS:	1) an adverse effect 2) an event 3) something or someone 4) worse off than they were before the event.
1. AN ADVERSE EFFECT: how can we categorise harm? 1.1 The three categories of adverse effects relate to a negative shift in either: <ul style="list-style-type: none"> • actual states of existence, • legitimate expectations (ie, as objectively assessed), or • one person's competitive position relative to others. 1.2 The effect can be tangible or intangible. 1.3 The effect can be permanent or temporary.	
2. AN EVENT: what are the sources of harm? 2.1 Harm can be caused by human or animal agency, natural forces, natural processes or historical events. 2.2 A given state of harm may be the result of more than one causative event. 2.3 An omission may in some circumstances be seen as a harmful event.	
3. SOMETHING OR SOMEONE: what things can be harmed? 3.1 Things that can be harmed include people, objects (animate or inanimate), places, communities, institutions or states.	
4. WORSE OFF THAN THEY WERE BEFORE THE EVENT: how can we test for harm? 4.1 Harm has a quantitative aspect but the process of testing for harm is not a matter of summing benefits and burdens, because: <ul style="list-style-type: none"> a) harm can relate to adverse changes of three qualitatively different kinds, and b) the negative effect can be either permanent or temporary. 4.2 Harm to a human being can be detected by comparing a person's actual state, legitimate expectations, or competitive position before and after an event, in order to identify any negative shift or worsening of status over that period.	

2.3 Hard cases: comparing the tests for causing harm

The first example concerns the typical ‘hard case’ scenario where one person imposes an actual setback on another in order to avoid a greater, but otherwise inevitable, fate. Joel Feinberg, Judith Jarvis Thomson, and Seana Shiffrin all offer variations of a ‘difficult rescue’ scenario where a would-be rescuer must make a tragic choice to amputate a trapped but unconscious man’s limb because it is the only way to save him from a raging torrent that will drown him unless he can be freed.⁸⁰ Shiffrin concludes that the victim has been harmed in this scenario,⁸¹ but both Feinberg and Thomson argue that in these cases the rescuer has not harmed the victim because, all things considered, any *prima facie* harm caused by the amputation is cancelled out by the greater benefit of life conferred by the rescue.⁸² By applying the counterfactual ‘worse off *than he would otherwise have been*’ test, they conclude that because the trapped man is now alive but would have been dead if the amputation had not taken place we cannot say that the rescuer has harmed him. By applying the linear accounting or ‘summing’ approach they conclude that, because the rescue has conferred an overall, net benefit to the trapped man, we cannot say that the rescuer has made him worse off than he was before the event took place.

My analysis of this case appears in Table 2.3. I suggest that the single act of amputating the arm provides a clear example of a mixed blessing; it was an act that conferred both a benefit and a burden. We can conclude that the amputation was harmful because it made the (previously whole) victim’s physical state worse than it was before. This is evidenced by the negative shift between points (b) and (c). However, if we compare the victim’s expectations before and after the amputation, we can also identify a positive shift from an expectation of death at (B) to an expectation of a continued life at (C), and so we can conclude that this act was also the means by which the benefit of life was conferred upon the victim. I suggest that this is as far as we need to go in this case to understand fully the issues raised by the

⁸⁰ Feinberg, ‘Wrongful Life and the Counterfactual Element in Harming’ above footnote 63 at 169; Shiffrin, ‘Wrongful Life, Procreative Responsibility, and the Significance of Harm’, above footnote 53 at 120, 125-129; Thomson, *The Realm of Rights*, above footnote 53 at 187-191, 263.

⁸¹ See references in footnote 80, above.

⁸² Thomson, *The Realm of Rights*, above footnote 53 at 263; Feinberg ‘Wrongful Life and the Counterfactual Element in Harming’ above footnote 63 at 169.

concept of harm and that any further analysis is justified only in order to answer other questions that go far beyond the issue of harm.

TABLE 2.3 AMPUTATION RESCUE [Premise: only an amputation of the trapped limb will save the unconscious victim.]		
Event	Actual Physical State	Legitimate Expectation
1. Victim trapped in river.	(a) able bodied and healthy	(A) ordinary life expectancy
		↓
2. Rescuer arrives and amputates limb.	(b) able bodied and healthy	(B) death (from drowning)
	↓	
	(c) minus one limb, but healthy	(C) life
3. Victim survives.	(d) minus one limb, but healthy	(D) life

We do not need to add up an overall tally to work out whether a net harm or net benefit occurred, and in fact, a 'final' tally would obscure the truth that in this case the victim had something to be grateful for as well as something to regret. The reason why some do go further and adopt a summing approach to assessing harm is because they are trying to answer different questions. A utilitarian who equates wrongdoing with harm-doing might undertake such an assessment to decide the question as to whether it was morally right to amputate the arm. We might also attempt similar balancing processes if we were arguing over whether the victim could bring a suit against his rescuer for the loss of the arm or whether the rescuer could be criminally responsible for the amputation. These issues are similar to the normative questions that Feinberg seeks to answer, however, I have argued that Feinberg has not only oversimplified the process by looking only at actual states and ignoring expectations, but he has also overloaded the test by combining two inquiries that should be kept separate. In relation to 'Amputation Rescue', it is significant that both Feinberg and Thomson adopt normative accounts of harm⁸³ and this fact may account for their desire to conclude that the rescuer had not harmed the trapped man. But while they may well be right to conclude that the rescuer had not *wronged* the trapped victim in this case, they are not right to allow this intuition to seduce them into adopting a

⁸³ See references above, footnotes 80 and 82.

misleading test for harm that yields the conclusion that the victim had not been *harmed* by the events.

It is important to understand that once we do move on to consider the second phase of our inquiry into these events and ask ourselves whether the rescuer was justified in going ahead and amputating the limb, we may well adopt a process for deciding the issue that weighs the gravity of the two alternative possible fates of the victim in order to come to an 'all things considered' answer. However, this is not the same as adding up numbers in order to determine whether on balance the rescuer has harmed the victim. There are three reasons why the two inquiries are different and they relate to differences in: the nature of the inquiries themselves; the nature and aims of the process that answering each one requires; and the nature of the things that are the subjects of the comparison in each inquiry.

The first difference lies in the nature of the two inquiries and the kinds of answers they require: one is normative, the other more factual or descriptive. The factual inquiry of determining whether an event was harmful may require more than one single conclusion to capture the full descriptive truth of the events. But the normative question as to whether an act was right or wrong does require a single answer.⁸⁴ When we face a decision over whether to act or not to act, or when we must judge whether another's act was right or wrong, we cannot allow two contradictory answers to stand. Even though we may accept the apparent paradox of harm when describing everyday events, there is no corresponding paradox when it comes to wrongdoing. We cannot accept that an act was both right and wrong; a person cannot be found to be both guilty and not guilty at the same time. However, while the normative question 'Should the rescuer have amputated the limb?' is a yes/no question that requires one conclusion, it does nevertheless allow for an answer that comes to an 'all things considered' conclusion: 'On balance, we think it was better to amputate the limb because death is a worse fate than life without one limb.'

Significantly, the process that we use in coming to this conclusion does not require us to compare two actual quantities or factual amounts of harm that we measure in the two alternatives before us. Rather, we are comparing the alternatives in terms of their

⁸⁴ Vinogradoff pointed out that when we make decisions about crime, wrongdoing and social justice we hold 'the accused in a vice and must direct him either to the right or to the left.' Vinogradoff P, *Outlines of Historical Jurisprudence*, (Oxford University Press, 1920) at 35.

objective desirability. This points to the second difference between the two inquiries. When we judge whether the amputation was justified, the comparison is aimed at revealing our attitude to the two possible outcomes. We ask ourselves whether, all things considered, life without one limb is objectively preferable to no life at all in order to decide whether the choice made between those alternatives was justified.⁸⁵ The process of comparison in an assessment of harm is quite different (and it has nothing to do with desires), but in neither case are we summing amounts of harm. Assessing harm is aimed at revealing whether something has been made worse off by an event by comparing it before and after the event in order to identify a negative shift in actual state, expectations, or competitive position. The comparative process focuses on describing factual changes to one thing over time, not on weighing two alternative things to make a normative choice between them.

The third difference between the two inquiries relates to the nature of the two subjects of comparison. In the inquiry about justification, the three items that are being compared are commensurable, because they are both of similar types (ie, they are both possible, imagined, future states of existence), but in the inquiry about harm we cannot arrive at a single answer using some form of calculation because the things that we wish to take into account are often of qualitatively different types. In these cases numerical comparisons across the three categories are not only impossible, but pointless. All three of these features give us further reasons to prefer the historical factual test to Feinberg's normative counterfactual test that requires a comparison of the victim's actual state with the state they would otherwise be in if things had been different. Feinberg's test suggests that we compare an actually existing state with an imagined alternative state: *the* one that 'would have been the case' if the events had been different. The problem is that there is no single state that we can be sure would have been the case. Because the future offers many possibilities it is better to adopt a test that avoids as much as possible any attempts to make such comparisons. Feinberg's test needlessly requires us to factor into an impossible calculation, the incommensurable and imaginary effects of events that did not occur and which could, by definition, have been otherwise. The virtue of the historical 'worse off' test is that by requiring us to focus at each point only on the actual results of events that have

⁸⁵ It is in these kinds of cases, and not when we are assessing harm, that Robinson's suggestion noted above, text at footnote 60, that we orient our thinking to the ultimate outcome makes better sense.

actually occurred, it allows us to avoid having to take into account imaginary future outcomes.⁸⁶ This can be illustrated by another case that poses great difficulty for Feinberg, but which becomes very simple if we use the historical ‘worse off’ test. This is the ‘Taxi Driver’ case, where a man caught a taxi to the airport, intending to catch a pre-booked flight. On the way to the airport, the driver recklessly caused an accident and the man’s resulting injuries prevented him from catching the plane, which, it turned out, crashed shortly after take-off, killing all aboard.

TABLE 2.4 TAXI DRIVER		
[Premise: V intends to catch a plane which later crashes, killing all aboard.]		
Event	Actual Physical State	Legitimate Expectation
1. Victim enters taxi.	(a) fit and healthy	(A) ordinary life expectancy
2. Taxi crashes.	↓ (b) injured, but recovering	(B) life
3. Plane takes off without V and crashes.	(c) injured, but recovering	(C) life
4. Victim lives.	(d) injured, but recovering	(D) life

If we apply Feinberg’s first version of the counterfactual test the answer appears to be that the taxi driver has not harmed the victim, but has in fact, benefited him because the man would have been in a worse position if had he caught the plane and been killed in the crash. It was this kind of case that led Feinberg to add the extra condition that asks whether the victim would have been worse off otherwise, in the normal course of events as they were reasonably foreseeable in the circumstances.⁸⁷ Feinberg’s revised question finally reveals the answer that matches his intuitive conclusion that the accident in the taxi did harm the victim, but the revised test is still flawed because it requires a comparison of the actual results of an event that did

⁸⁶ It might be objected that the consideration of a person’s expectations also involves looking into the future, however, the assessment of legitimate expectations focuses, not on the state of expectation or a state of mind that may or may not exist in the future, but on assessing existing, factual rationally ascertainable expectations that are located in the historical past or existing present.

⁸⁷ ‘Wrongful Life and the Counterfactual Element in Harming’ above footnote 63 at 153.

happen with the imagined results of an event that did not, but might have, happened in an alternative, parallel, imagined, but 'normal' version of reality. An application of the 'worse off' test shows, however, that this case presents as a problem only if we use the counterfactual test. If we track the actual events and the actual changes in the victim's condition and expectations that followed each event, we come easily to the straightforward conclusion that the driver did harm the victim. The harm assessment in this case is simple: the accident worsened his physical state but had no effect on his life expectancy. The occurrence of the plane crash did not in fact affect either the victim's physical state or his legitimate expectations of life, because he did not actually catch the plane. The only effect that the crash may have had on the victim is to change his attitude to the accident in the taxi. Once he had heard what had happened to the plane, the victim might view the taxi accident as a blessing in disguise and feel glad that it had occurred, but he would still have to deal with the harmful injuries it caused in the life that he faced after the accident.

Cases of multiple sufficient causes also create difficulties if we apply the counterfactual approach to testing for harm, but again, they do not pose any problems for the historical 'worse off' test. In the usual version of this case, two shooters, each aiming to kill the victim, fire at the same time two equally lethal bullets, both of which strike the victim who subsequently dies. The presumption is that either shot would have caused death and the problem is therefore that we cannot say, after applying the ordinary counterfactual test to each shooter and asking 'Would the victim have died if this particular shot had not been fired?' that the victim would have survived. Feinberg's expanded counterfactual test requires us to ask whether, in the normal course of events as they were reasonably foreseeable in the circumstances, the victim would have been worse off if one particular shooter had not fired. However, depending on the meaning that we give to 'normal course of events' and 'in the circumstances' this revised test either gives us the same answer as the previous test or else it requires us to ignore the very fact that made this case so difficult in the first place. If 'the circumstances' include the fact that another shooter made a fatal shot, then the new test simply replicates the results produced by the ordinary 'but for' test. On the other hand, if 'the circumstances' do not include the existence and conduct of the other shooter, then we will be solving a completely different problem from the one that actually faces us. In essence, the question that Feinberg wants us to ask is:

‘Would the outcome be otherwise if the facts were otherwise?’ but the trouble with this suggested solution is that we cannot solve our problem by denying its existence.

TABLE 2.5 THE TWO SHOOTERS
[Premise: either shot is sufficient to cause death]

Event	Actual Physical State	Legitimate Expectation
1. V enters.	(a) fit and healthy	(A) ordinary life expectancy
2. D1 shoots V in heart at the same time as 3. D2 shoots V in heart.	↓	↓
	(b) seriously ill with two mortal wounds	(B) life expectancy reduced: • death from gunshot No. 1 • death from gunshot No. 2
4. Patient dies.	↓	
	(c) dead (from gunshot)	(C) –

My analysis of this case reveals that we can make sense of the events without having to deny any of the facts, or having to ask what might have happened if what actually happened had not happened. I suggest that we can make a finding that each shooter harmed the victim at the same time by worsening his physical state and by creating a separate risk to V’s expectation of a continued life. Each shooter caused a separate fatal wound, and each made an independent contribution to the victim’s eventual fate which was sufficient to cause death, and in both cases the expectation of death which they created was in fact realised. If they intended to kill the victim, and they had no defence, then we have two murderers. By avoiding the ‘but for’ test we have avoided the problems that it yields.

John Fleming has argued that the counterfactual or ‘hypothetical test is really indispensable’ in cases of omissions because ‘direct perception cannot solve all causality of omissions.’⁸⁸ However, as we have seen above in ‘Snakebite’, the ‘worse off’ test does offer a useful way of analysing these cases. It has also been argued that one of the prime virtues of counterfactual or ‘but for’ test is its negative function of screening out factors which made no difference to the outcome,⁸⁹ but the ‘worse off’ test can also serve this function and at the same time avoid the need to consider what

⁸⁸ Fleming JG, *The Law of Torts*, 9th ed, (LBC Information Services, Sydney, 1998) at 220.

⁸⁹ Fleming, *The Law of Torts*, above footnote 88 at 220.

might have been if the world had been different. So, for example, let us reconsider the ‘Snakebite’ case, and change the facts slightly by adding the fact that the venom had so badly affected the victim that nothing could have saved her. In this version, as in the previous version, the doctor, in breach of his duty, failed to treat the patient, the difference being that his conduct could not have affected her fate in any way.

TABLE 2.6 SNAKEBITE No. 2		
[Premise: no antidote would have saved the patient.]		
Event	Actual Physical State	Legitimate Expectation
1. The snakebite.	(a) fit and healthy ↓	(A) ordinary life expectancy ↓
2. Victim attends hospital and requests antidote.	(b) seriously sick from venom	(B) death (from venom)
3. Doctor sends victim home.	(c) seriously sick from venom	(C) death (from venom)
4. Victim dies.	(d) seriously sick from venom ↓ (e) dead from venom	(D) death (from venom) (E) –

This version of the case is similar to the facts of the famous torts case of *Barnett v Chelsea Hospital*⁹⁰ where it was held that the failure of a doctor to treat a man who was doomed to die was not causally relevant to his eventual death from arsenic poisoning. This conclusion is confirmed by the application of the ‘worse off’ test, illustrated in Table 2.6. In this example, we can see that the doctor’s presence made no difference to the final outcome, and made no changes at any point either to the victim’s actual physical state or to her life expectancy, as objectively assessed. Consequently, we can conclude, by comparing the victim’s unchanged expectation of death after the doctor entered the picture at (C) with her actual fate at (e), that the doctor’s conduct had no causal relevance to her final fate. Under this test, as with the counterfactual ‘but for’ test, the key lies in establishing that the patient was doomed to die. This enables us to characterise the expectation as unchanged after the patient requests the antidote. However, even though both tests cover much the same ground,

⁹⁰ [1969] 1 QB 428.

the advantage of the ‘worse off’ test is that we do not have to wonder what would have been if the world had been different. All that we have to do is to determine the extent of the poisoning at the point that the doctor appeared on the scene and track the events and outcomes accordingly. When we do this we can see not only that the threat to the patient’s life posed by the venom (which is highlighted in bold in Table 2.6) persisted unchanged throughout the subsequent events but also that the doctor’s conduct had no effect on either the patient’s actual state or her expectations.

The well-known criminal case of *R v Blaue*⁹¹ is another case that poses difficulties because of the refusal of the mortally wounded victim of a stabbing attack to accept a life-saving blood transfusion. The usual characterisation of the issue in this case is whether V’s refusal, as a new intervening act, constituted a break in the chain of causation between the stabbing event and her eventual death. By contrast with the counterfactual or ‘but for’ test, the ‘worse off’ approach to testing for harm can help us to understand better the causal relations between the events in this case, and its use allows us to determine that the stabbing did cause her death.

TABLE 2.7 <i>R v BLAUE</i>		
Event	Actual Physical State	Legitimate Expectation
1. Blaue stabs V.	(a) fit and healthy ↓	(A) ordinary life expectancy ↓
2. V taken to hospital and offered transfusion.	(b) seriously wounded	(B) death (from blood loss)
3. V refuses transfusion.	(c) seriously wounded	(C) death (from blood loss)
4. V dies.	(d) seriously wounded ↓ (e) dead from blood loss	(D) death (from blood loss) (E) –

In this case we can easily conclude from the two negative shifts in the victim’s physical state between (a) and (b) and between (A) and (B), that the stabbing harmed her. The crucial fact in this case is to establish that the victim did not at any point reach a position where her expectation of death from the blood loss was ever reduced

⁹¹ [1975] 3 All ER 446.

or displaced with an expectation of life. By contrast with the case of a non-believer, where a legitimate expectation of survival would arise once the blood transfusion had been offered and accepted (as happened in 'Snakebite' above), no expectation of life ever arose for the victim in this case. This is because the victim, who was a practising Jehovah's Witness, chose to follow her beliefs and refuse the offer of the transfusion. Given that only an acceptance of the transfusion or an actual transfusion could have created the expectation of life in these circumstances, and that nothing displaced the existing expectation of death caused by the stabbing, her failure to accept the transfusion cannot be seen as a harmful event at all because there is no negative change either in expectation or actual state before and after her refusal.⁹²

If we compare the victim's expectation of life before Blaue stabbed her at (A) with her actual death at (e), we can add to the fact that Blaue had harmed the victim, the conclusion that his conduct made a difference to her final fate. We can also conclude, by comparing the expectation of death from blood loss, which his conduct created at (B) and which remained constant throughout the later events, with her actual death from blood loss at (e), that Blaue's conduct was the relevant cause of the actual harm that finally occurred, and so we can lay the three factual foundations for any further inquiry into the issue of criminal responsibility. This task would require us to decide whether we can fairly take the victim's refusal into account when convicting and punishing the offender, but this raises normative issues that cannot be answered by any further factual inquiries. So, despite the fact that we often use causal language like 'breaks in the chain of causation' to characterise these issues, this harm based analysis suggests that many of these cases may not really raise questions about the meaning of causation, but about the meaning of harm and fair punishment instead.

The counterfactual approach to testing for harm focuses in this case only on the victim's failure to accept the transfusion and it requires us to ask whether the victim would have been in a worse position if, rather than refusing the blood transfusion, she had accepted it. It gives the answer that, because she would have been better off by

⁹² We can distinguish the earlier case of 'Snakebite' in Table 2.1 (where the expectation of life was created by the victim's request from the hospital for the antidote) because the doctor in that case had a duty to administer the antidote to the patient once it had been requested, whereas in this case, because the offer to transfuse had been refused, the doctor came under a duty to respect the patient's autonomy and withhold the transfusion. So, in Snakebite, the request plus the duty created the expectation, but in this case the refusal plus the duty meant that no expectation came into being.

accepting the transfusion, her refusal, as an intervening act, was the cause of her death.⁹³ But this is a question that requires us to deny the key truth about the victim: she *was* a Jehovah's Witness and although she had a choice, she *did not* accept the blood. The counterfactual test alters the scenario by forcing us to take away the two facts that make all the difference to the case, moreover, these are facts that should be respected, not denied. The counterfactual test which focuses on only one of the relevant events and not the whole series of events yields the wrong answer because it asks the wrong question.

The 'worse off' approach to the problem of intervening events works better than the counterfactual test in the case of '*R v Blaue*', but it needs to be tested further to see whether it allows us to deal with other intervening events. If we change the facts of that case by adding the extra facts that the victim had first accepted the transfusion, but had then contracted a fatal infection in the hospital, we create a more difficult problem. This case of 'Hospital Infection' can be resolved fairly readily, however, by focusing more widely on the full range of factors that account for the negative changes that we perceive in V's original expectation of life. In the original case, the risk which Blaue's conduct most obviously created – of bleeding to death – was the one that crystallised into reality, and so we did not consider the wider range of risk factors that his conduct may have created. Nor did we take them into account when we calculated the effect of his conduct on V's legitimate expectations of a continued normal life.⁹⁴ However, a stab wound can give rise to other kinds of risks, and so, to accommodate this revised scenario, we need to broaden our analysis by recognising

⁹³ In *Causation in the Law*, above footnote 57 at 361, Hart & Honore argue that 'it was not her free act to refuse the transfusion' because once the victim had chosen her religious beliefs, she was 'not thereafter free to abandon her chosen beliefs'. However, the victim in this case should not be portrayed as an automaton who had no choice just because she held religious views. On the facts, she did have a choice – a stark and tragic choice either to abandon her hope of life or to abandon her beliefs. Perhaps Hart & Honore forced the analysis into this direction in order to avoid having to characterise V's refusal as an intervening act that therefore constituted a break in the chain of causation. My analysis does not need to adopt this ploy.

⁹⁴ For ease of exposition, I have characterised the change in expectations in previous scenarios as a simple binary switch between 'life' and 'death' but in one sense these are simply two poles of one single expectation. In the next scenario I will characterise all of the effects only in terms of the victim's expectation of life as it ebbs and flows in strength, and I will identify the factors that explain why our assessment of the strength of that expectation changes.

that the victim’s reduced expectation of life at (B) can be accounted for more completely by taking into account not only the risk of bleeding to death, but also the somewhat weaker risk of contracting a deadly infection in the wound. This would allow us to establish that the factor that accounted for her death from the infection at (e), was one of the two factors that originally weakened V’s expectation of life immediately after the attack. Most importantly, this factor, which initially harmed V by reducing her expectation of life, remained in place until her actual death.

TABLE 2.8 HOSPITAL INFECTION		
[Premise: wound was sufficient to cause death]		
Event	Actual Physical State	Legitimate Expectation
1. D stabs V.	(a) fit and healthy	(A) ordinary life expectancy
	↓	↓
2. V accepts transfusion.	(b) seriously wounded	(B) life expectancy greatly reduced by risk of: ⁹⁵ <ul style="list-style-type: none">• death (from blood loss);• death (from infection)
3. V contracts infection.	(c) wounded but recovering	(C) life expectancy partially restored by transfusion but some risk remains, ie: <ul style="list-style-type: none">• death (from infection)
	↓	↓
4. V dies.	(d) seriously ill from infection	(D) life expectancy greatly reduced as risk of: <ul style="list-style-type: none">• death (from infection) increases in strength
	↓	
	(e) dead from infection	(E) –

It appears that the difficulty caused by natural events like contracting an infection can be catered for by the ordinary test for harm. The possibility of infection was one of the risk factors that would legitimately have been taken into account when we concluded that the strength of V’s expectations of life had been reduced by the stabbing, and, because that factor remained in place from the time immediately after the attack until the actual death, the attack can be characterised as causing the ultimate harm, despite the fact that the risk of infection may initially have had a lesser effect

⁹⁵ See comments in footnote 94 above.

on V’s expectations of life by comparison with the more immediate threat posed by the blood loss.

The fact that we calculate a person’s expectations in the light of the kinds of harm ordinarily created or risked by an event, explains why we label only certain kinds of subsequent events as breaks in the chain of causation and limits to some degree the role of foreseeability in our calculations. This limit arises because, while many events and their consequent effects might be theoretically foreseeable, not all of them necessarily affect our expectations. So, if an event is so utterly unlikely that neither it nor its effects on the victim would realistically have entered into our calculations at the point when D’s initial conduct took place, it is easier to see why, if such an event subsequently appears, we characterise it as a separate and independent source of the final harm that befell the victim. To illustrate the operation of this approach to assessing legitimate expectations, let us adapt the scenario again and add the fact that an earthquake destroyed the hospital on the day after the victim had been admitted and treated with the blood transfusion.

TABLE 2.9 EARTHQUAKE		
Event	Actual Physical State	Legitimate Expectation
1. D stabs V.	(a) fit and healthy	(A) ordinary life expectancy
	↓	↓
2. V accepts transfusion.	(b) seriously wounded	(B) life expectancy greatly reduced by risk of: <ul style="list-style-type: none">• death (from blood loss);• death (from infection)
	↓	↓
3. Earthquake strikes hospital	(c) wounded but recovering	(C) life expectancy partially restored by transfusion but some risk remains, ie: <ul style="list-style-type: none">• death (from infection)
	↓	↓
4. V dies.	(d) recovering from blood loss; crush injuries sustained	(D) life expectancy greatly reduced by risk of: <ul style="list-style-type: none">• death from crush injuries• death (from infection)
	↓	↓
	(e) dead from crush injuries	(E) –

In this scenario, the earthquake reduced the patient’s expectation of life by creating an immediate expectation of death by crush injuries, and, because no such expectation

had been created by the stabbing itself, we can argue that the stabbing could not be seen as the source of the crush injuries which led to the victim's death, despite the fact that it was historically prior to the earthquake and was the reason why the victim was in a position to be crushed by the fall of the hospital. By contrast, in the case of '*R v Blaue*', the expectation of death by blood loss was part of the original harm created immediately by the stabbing and it remained unchanged throughout the subsequent events. The 'worse off' test for harm, because it includes an examination of legitimate expectations, therefore offers us a factual basis for discriminating between events in these kinds of cases which the 'but for' test cannot do. The problem with the application of the 'but for' test in '*Earthquake*' and '*R v Blaue*' is that it suggests in both cases that the subsequent events (the earthquake and the refusal) were the cause of the harm – or were breaks in the chain of causation. By contrast, the 'worse off' test offers us a factual reason for labelling these two events differently; the earthquake was an independently harmful event, but in '*R v Blaue*' the victim's refusal had no harmful effect at all. In each case we assess the range of expectations that might reasonably be formed after D's conduct and, if the specific harm that eventually crystallises was one of the factors that led to the conclusion that the initial event was harmful, we can make the finding that D's conduct was its source. If, however, the subsequent event creates a risk of harm which (like the fatal crush injuries which V sustained in the earthquake) was *not* taken into account when we assessed the expectations after the original event, the second event is seen as constituting a separate, independent source of that harm.

Subsequent events that are constituted by human conduct may pose a more intractable problem because the choices made by an individual may themselves be affected by the harm that arose from the initial event. If we adjust the facts of '*R v Blaue*' for a final time by taking out the infection but adding the fact that the victim was so overwhelmed by her experiences that she committed suicide, we can create a scenario that fully tests the model. As in all of the previous versions of this case, we can establish that D has harmed V by affecting both her actual physical state and her expectations of life by pointing to the negative shifts from (a) to (b) as well as from (A) to (B). In this case, however, V's expectation of life that formed at (C) after the hospital treatment, was displaced by the new expectation of death at (D) that followed upon her conduct in taking the poison. This means that although we can establish that D has harmed V and created an expectation of death by blood loss (and possibly

infection), we cannot say that the expectation of the kind of death created by D was ever realised, because the victim died at (e) from the poison.

TABLE 2.10 SUICIDE [Premise: wound was sufficient to cause death]		
Event	Actual Physical State	Legitimate Expectation
1. D stabs V.	(a) fit and healthy	(A) ordinary life expectancy
	↓	↓
2. V accepts transfusion.	(b) seriously wounded	(B) life expectancy greatly reduced by risk of: <ul style="list-style-type: none"> • death (from blood loss); • death (from infection)
	↓	↓
3. V takes poison for which there is no antidote.	(c) recovering from wound	(C) life expectancy partially restored by transfusion but some risk remains, ie: <ul style="list-style-type: none"> • death (from infection)
	↓	↓
4. V dies from poison.	(d) recovering from wound; seriously ill from poison	(D) life expectancy reduced: <ul style="list-style-type: none"> • death (from infection); • death (from poison)
	↓	↓
	(e) dead from poison	(E) –

The case displays the same pattern as 'Earthquake' and this suggests that we could characterise both the suicide attempt and the earthquake as independently harmful events, one humanly caused, the other natural. It would be possible, by showing the shift from an expectation of life at (A) to V's actual death at (e), that D did make a significant, but indirect, difference to her ultimate fate. However, because the risk of death created by D's conduct did not match the kind of death that actually eventuated, we would have to conclude that only two of the three conditions that enabled us to conclude the issue in the earlier cases like 'Snakebite', 'Taxi Driver' and '*R v Blaue*' are present in this case. So, although we can establish an historical link between D's act and V's death in this case, we cannot actually say either in this case or in 'Earthquake' that 'He killed her.' Having drawn these conclusions, we would then have to decide whether they provide a sufficient foundation to proceed to the second stage of inquiry into wrongdoing and fault. Clearly, we can hold D responsible for stabbing V, but we would have to make an exception in order to hold him responsible for V's death, and, just as in the original case of '*R v Blaue*', we would have to ask

ourselves a different set of questions, none of which are factually based and all of which require us to consider normative or moral questions of fair attribution of criminal responsibility. It may be argued that even though the operative cause of death was the poison, it is enough to hold D responsible for the actual death of V on the grounds:

- that D had harmed V;
- that D's conduct created a *general* expectation of death; and
- that D directly put her into a position where she could not face life any more.⁹⁶

However, I would argue that the difference between 'death' and 'the death as it came about' is one worth preserving.⁹⁷ If we drop the specific characterisation of the kinds of death from our description in an effort to make the problem disappear, that would obscure the truth of the case in order to make conviction easier and I would argue that if we are to punish D for the death of V, we should openly explain the reasons why we do so. I suggest therefore that (depending on his state of mind) we can convict D in this case of either attempted murder or of intentionally causing grievous or serious bodily harm (but not of murder or manslaughter), and the remaining issue as to whether we can take the subsequent conduct of V (and her eventual death) into account when sentencing D is one that I will return to in Chapter Twelve.

This extended discussion comparing the tests for harm suggests that an analysis of the meaning of the concept of harm may be more useful to the criminal law than an analysis of the meaning of the concept of causation.⁹⁸ It has not only shown that we do not need to adopt any kind of counterfactual test when we ask whether an event was harmful or whether we can link a particular person's conduct to a particular harm, but it has also demonstrated that the historical 'worse off' test offers a better way of understanding and analysing complex events. The 'worse off' test has more to offer as

⁹⁶ We do not have to make this kind of argument in 'Hospital Infection' because the stab wound carried the threat of infection from the beginning, whereas in this case the stabbing did not carry the threat of death by ingestion of poison at all (despite the fact that it is not unforeseeable that a victim of a serious crime of violence may become suicidal).

⁹⁷ Hart & Honore discuss John Mackie's distinction between 'death' and 'death as it came about' in *Causation in the Law*, above footnote 57 at xli.

⁹⁸ Mark Kelman has argued that we cannot define causation at all in 'The Necessary Myth of Objective Causation Judgements in Liberal Political Theory' (1987) 63 *Chicago-Kent Law Review* 579 at 581. See also Moore MS, *Placing Blame*, (Clarendon Press, Oxford, 1997) at 337-341.

an analytical tool than either version of the counterfactual test, neither of which can help the analysis in cases of causal over-determination like 'Taxi Driver', or cases of successive events like '*R v Blaue*' and 'Hospital Infection'. The 'worse off' test can reveal the issues for decision more clearly because it describes the events more precisely. This factual historical test can also match the claimed benefits of the 'but for' approach as a method of screening out events that have not caused the harmful outcome in cases like 'Snakebite No. 2', but with the added benefit that it does not require the consideration of any hypothetical events or non-existent outcomes.

The historical test that inquires more deeply into the respects in which a person has been made worse off is a more complete and coherent test that is faithful to the natural meaning of the concept; when we say that 'X harmed Y' we are making a factual assessment, not asserting a counterfactual proposition.⁹⁹ The test also reflects everyday usage and essential human concerns which extend beyond actual states of existence to take account of competitive positions and expectations as well. Consequently, this test directs the investigation of harm into a properly wide scope which allows consideration of all of the relevant results of an event or a series of events – it does not artificially limit it (as Feinberg does) only to human conduct, nor does it exclude as harm a setback to a person's interest that has been consented to by that person.¹⁰⁰ Because it does not equate harm-doing with wrongdoing, the test does not try to dissolve the paradox of harm, but uses it to gain a better understanding of the events in question. Furthermore, by illuminating the events more clearly, it can identify with more precision the separate decisions that need to be made before we move on to consider the normative questions of whether someone's conduct was wrong and whether to hold them criminally responsible, not only for their conduct, but for the consequences of their conduct.

The added advantage of the three category test is that it does not require us to imagine what the world would be like if it was different. It does not attempt to solve difficult cases by taking out the very facts that make the case difficult. Rather, it faces those facts and points us towards a solution. It does not ask hypothetical questions about the imagined effects of unreal events or ask us to sum incommensurables in

⁹⁹ Moreover, if X has intentionally wounded Y, we do not usually stop to wonder what would have happened if X had not wounded Y.

¹⁰⁰ Feinberg, *Harm to Others* at 215.

order to come to a single answer to questions about harm. Instead it focuses only on actual events and tracks all of the varied consequences that have followed upon them. This approach does not overload the concept with extra normative considerations that are derived from inquiries about wrongfulness or fault and which can confuse our responses. It shows us how to keep separate the two separate inquiries and gives us a reason to do so. By avoiding these errors associated with the counterfactual test we can avoid the kinds of counter-intuitive answers that it yields in complex cases and so we are not forced, as Feinberg is, into repeated attempts to adjust the test.

I have defined harm as the adverse effect of an event that has made someone or something worse off and suggested that as human beings we are vulnerable to suffering harm either in respect of our actual states of existence, our expectations, or our competitive positions. I suggest that this definition (which was summarised in Table 2.2) offers a better account of the ordinary meaning of the concept than the extended normative definition and the modified counterfactual tests that have been put forward by Joel Feinberg. Of course, this definition, and the test that is based upon it, cannot solve all of our problems associated with the concept of harm. However, both the test and the definition do allow us to see more clearly what the problems are. I will return to this definition again in Chapters Six and Seven, where I will use it to analyse the accounts of criminal harm offered by philosophers like Joel Feinberg, John Stuart Mill and Antony Duff, and also in Chapter Nine, where I will move from defining the meaning of the concept of harm to the next stage of applying the definition to actual cases so that we can give some factual content to the concept and develop a list of harms that may be relevant to the decisions that we must make both when we are legislating the criminal law and when we are convicting and sentencing offenders for their crimes.

In the light of this definition and the conclusions that I have drawn from the discussion in this section, I want to suggest, contrary to the views expressed by Feinberg, and Lacey & Wells, that harm in its everyday usage is essentially a descriptive and not a normative concept. Deciding how to respond to the negative effects that make something or someone worse off may well be a normative, and

sometimes a politically and culturally controversial, exercise.¹⁰¹ We are guided in the decision by our wants, desires and values, but the questions that dominate our thinking about harm itself are not normative questions. Harm is *prima facie* something negative, so often we want to know what we need to do to avoid the threat of harm. In the aftermath of a harmful event, we want to know how it came about, who caused it, what kinds of harm have resulted, and how extensive that harm has been. We also want to find out how we can go about undoing the harm and restoring the state of affairs that existed before the event occurred. These issues that preoccupy us in everyday life when we consider harm are not normative but are primarily factual, descriptive and quantitative. Assessing harm requires selection, judgement and interpretation, but in the main these involve choices about which facts are relevant, which points of comparison are appropriate, which expectations are legitimate. They are not like, and should not be confused with, the kinds of normative or moral inquiries that we engage in when we consider such questions as whether certain conduct is wrong or whether to hold someone legally responsible for their harmful conduct. The fact that many criminal law theorists do describe harm in normative and not factual terms may be because of harm's close proximity to the undeniably normative concepts of wrongdoing and fault within the criminal law. For this reason it is important that, once we have noted the challenges that the concept of harm poses in the criminal justice process in the next section, we go on to consider the meaning of the concepts of wrongdoing and fault in Chapter Three.

2.4 The challenge of harm in the criminal law

I have argued that the natural meaning of the term suggests that the essence of harm-doing lies in the fact that an act or an event has resulted in a certain kind of effect, rather than in some unique feature that we recognise in the conduct itself. If we apply this ordinary understanding to the context of the criminal law, we can define harm quite simply as the adverse effects of an offender's criminal conduct that make someone or something worse off. This definition points up two key aspects of the concept of harm when we turn to judge human behaviour in the legal context: first,

¹⁰¹ See West R, *Caring for Justice*, (New York University Press, 1997) at Chapter 2, and Conaghan J, 'Law, Harm and Redress: a Feminist Perspective' (2002) 22 *Legal Studies* 319 at 321, both of whom discuss the feminist critique of the legal system's approach to gendered harms.

we must be able to specify the conduct that constitutes the legally significant event; and secondly, we must be able to link that conduct to a factual change for the worse in some person, place or thing. We have seen, however, that although the concept is relatively easy to define and understand, it is not always a simple matter to apply it when judging practical cases. The concept causes problems at three different stages of the criminal justice system; at the point of legislation, at the point of verdict, and finally, at the point of sentence. The problems that we encounter at each stage are different and the current solutions that we have developed to deal with those problems in one part of the process do not necessarily provide solutions to the problems found at another stage. At times, the suggested solutions may themselves create difficulties in subsequent stages and this is particularly true when we seek to move from the substantive criminal law, where the issue is whether the occurrence of a criminal offence can be proved, to sentencing law, where the issues raised are matters of evaluation and questions of degree.

Despite the fact that we share the capacity to detect pain, damage, hurt or loss,¹⁰² difficulties in the legislative task arise because we do not always agree about whether to prohibit a particular kind of harm-risking or harm-causing conduct. The problem is that our shared understanding of the meaning of the concept of harm does not necessarily lead us to agree over what kinds of negative effects should qualify as instances of harm in practical cases. We may agree about core examples, but at the penumbra opinions differ. The difference of opinion derives not from our different abilities to perceive negative changes in a material or factual sense but from our opposing interpretations of the significance of harm and the reasons each of us gives for responding to it. So, for example, although we might agree as a matter of fact that a person has been distressed by a particular event, we might disagree over whether being distressed constitutes being harmed, and we might differ further on the merits of sanctioning the conduct that leads to those effects. Deciding upon what is to count

¹⁰² Bowles S & Gintis H, 'The Economy as a Complex Evolving System', Nov 2001, <http://www-unix.oit.umass.edu/~gintis/papers_ind> argue that humans have been 'hard-wired' by natural selection to detect and avoid pain, damage, hurt or loss at 22-23. Furthermore, results of surveys indicate a high degree of community consensus in our assessments of the degree to which something has been harmed: see Schade D, Sunstein CR & Kahneman D, 'Deliberating About Dollars: The Severity Shift' (2000) 100 *Columbia Law Review* 1139; and Eisenberg T et al, 'Judges, Juries, and Punitive Damages: An Empirical Study' (2002) 87 *Cornell Law Review* 743.

as harm can be controversial.¹⁰³ One person may take the view that distress is merely unpleasant and argue that since it does not make a person worse off in practical terms, it cannot be classified as harmful, while another may see all adverse effects as harmful. We may disagree about whether causing pain or grief to another is harmful, whether offending or disgusting someone is harmful, or whether imposing a risk of harm on someone is itself a harm.¹⁰⁴ Nothing of substance normally turns on such definitional disagreements but when criminal (or civil) sanctions follow upon our decisions to give legal recognition to particular categories of damage to personal and community interests, the deeper normative aspect is brought into high relief and our focus shifts from the effects of the conduct to a consideration of the meaning and moral nature of the conduct itself.

Harm, like pain, has a negative connotation attached to it, and for our own sake as individuals we naturally seek to avoid conduct that leads to either experience. However, when a community criminalises a particular type of harm causing conduct, a different kind of negative evaluation is made; an additional set of emotions is aroused; and our reasons for avoiding the conduct are doubled. Beyond the fact that

¹⁰³ Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 101. West R, *Caring for Justice*, above footnote 101 discusses gendered harms in Chapter Two.

¹⁰⁴ The contentious issue of whether causing physical or emotional pain can amount to causing harm will be discussed in section 9.2 in Chapter Nine.

On the issue of offence, see: Feinberg J, *The Moral Limits of the Criminal Law, Volume 2, Offense to Others*, (Oxford University Press, 1985); Hörnle T, 'Offensive Behaviour and German Penal Law' (2001) 5 *Buffalo Criminal Law Review* 255; von Hirsch A, 'Injury and Exasperation: An Examination of Harm to Others and Offense to Others' (1986) 84 *Michigan Law Review* 700; von Hirsch A, 'The Offense Principle in Criminal Law: Affront to Sensibility or Wrongdoing?' (2000) 11 *Kings College Law Journal* 78; and Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269.

For discussion of whether imposing a risk of harm is a harm, see: Perry SR, 'Risk, Harm and Responsibility' in Owen D (ed), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995) 321; Finkelstein C, 'Is Risk a Harm?' (2003) 151 *University of Pennsylvania Law Review* 963; and Larry Alexander's critique of Lawrence Becker's article 'Criminal Attempt and the Theory of Crimes' (1974) 3 *Philosophy and Public Affairs* 262, in 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1; and his critique of Feinberg in 'Harm, Offense and Morality' (1994) 7 *Canadian Journal of Law and Jurisprudence* 199.

the conduct can cause harm (which is in itself a *prima facie* reason for avoiding it)¹⁰⁵ the knowledge that the community disapproves of the conduct on moral grounds leads us to avoid the conduct so as to escape the experience of the social emotions of shame or guilt, as opposed to the basic emotions of pain or fear.¹⁰⁶ The issue is whether the introduction of the normative aspect identified above arises from the nature of harm itself or from our attempts as a community to link it with the matter of wrongdoing. I will discuss this issue in more detail in Chapter Three and will explore the differences between harm and wrong and their different evaluative challenges in Chapter Four.

Many crimes, for example, murder, wounding, and causing grievous bodily harm, are defined in terms of causing (or attempting to cause) a specified harmful result, whereas others, for example, rape, robbery, etc, do not include results in their definition. In cases where the offence is a 'result crime' the contentious question of whether an omission (as opposed to an act) can cause harm is sometimes raised as a theoretical problem facing legislators.¹⁰⁷ In section 2.3 I applied the test derived from

¹⁰⁵ James Griffin argues that this *prima facie* moral rule applies whether the pain risked threatens the self or others: see *Value Judgment*, (Clarendon Press, Oxford, 1996) at 73-75.

¹⁰⁶ See French PA, *The Virtues of Vengeance*, (University Press of Kansas, 2001) at 146-147; and Rawls J, *A Theory of Justice*, (Oxford University Press, 1973) at 443. Bowles and Gintis discuss the evolutionary advantages for individuals and communities of the basic or 'pre-social' emotions (pain, pleasure, anger, fear, surprise and disgust) and the social emotions (shame, love, guilt, embarrassment, humiliation, pride, envy and jealousy) in their paper 'The Economics of Shame and Punishment' presented to the Santa Fe workshop 'The Economy as a Complex Evolving System', Nov 2001, <http://www-unix.oit.umass.edu/~gintis/papers_ind>. Further discussion of the basic and social emotions can be found in Plutchik R, *Emotion: A Psycho-evolutionary Synthesis*, (Harper & Row, New York, 1980) and Eckman P, 'An Argument for Basic Emotions' (1992) 6 *Cognition and Emotion* 169. See also Simester AP, 'Can Negligence be Culpable?' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 85 at 93, who argues that the idea of blame presupposes an external standard; Williams B, *Shame and Necessity*, (University of California Press, 1993) at 82 who argues that shame involves 'an idea of the gaze of another'; and Feinberg J, 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It' (1995) 37 *Arizona Law Review* 117 at 129. See also Ahmed E, Harris N, Braithwaite J & Braithwaite V, *Shame Management Through Reintegration*, (Cambridge University Press, 2001); and Massaro TM, 'Show (Some) Emotions' in Bandes S (ed), *The Passions of Law*, (New York University Press, 1999) 80, especially text at footnotes 21-26, and references therein.

¹⁰⁷ See Feinberg, *Harm to Others* at 159-186; Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 47-48 and 110-133; Moore MS, *Act and Crime*, (Oxford University

our ordinary understanding of the concept of harm to a number of cases of omissions and demonstrated that if we take account of expectations as well as actual states, omissions can in some circumstances be considered to be harmful events.¹⁰⁸ I will discuss this issue in more detail in section 11.2 of Chapter Eleven when I discuss the easy rescue cases, which, like all cases of omissions, also raise the normative question of whether or not we are justified in criminalising the impugned conduct and imposing an affirmative duty to act in these circumstances.¹⁰⁹ Adherence to the liberal harm principle or to theories of punishment based on corrective justice sometimes leads legal philosophers to define omissions (and attempts) in terms of moral or social harm, and these questions will be discussed in Part II. However, to allow for the fact that our current criminal laws do sometimes sanction omissions I will use the term ‘conduct’ rather than ‘act’ in the evaluative model of a crime that is outlined in Part IV.

Theoretical debates over the concept of action and the issue of causation arise because of harm’s twin focus on cause and consequence – or event and effect. It creates problems not only for those who must define the crimes but also for judges who must interpret the provisions and juries who must apply them in specific cases. So, before the point of verdict, if a crime includes the causing of a particular kind of harm within its definition, we must address the problem of causation and devise clear definitions and rules to guide a jury’s decision to link a person’s wrongful conduct with a particular harm. As I have suggested in section 2.3, careful attention to the ordinary meaning of the concept of harm (as opposed to the meaning of the concept of causation) can greatly aid these decisions that lay the foundation upon which a jury can convict a defendant, and I will discuss the limits on our decisions that may be derived from this understanding of harm in Part IV.

Press, 1993) at 267ff, *Placing Blame*, above footnote 53 at Chapter Six (and the Symposium on Moore’s account in Volume 142 (1994) *University of Pennsylvania Law Review*); Honore AM, *Responsibility and Fault*, (Hart Publishing, Oxford, 1999) at 12, 41; and Smith P, ‘Legal Liability and Criminal Omissions’ (2001) 5 *Buffalo Criminal Law Review* 69; Alexander L, ‘Criminal Liability for Omissions: An Inventory of Issues’ in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 121.

¹⁰⁸ See the contrasting results in Table 2.1 ‘Snakebite’ and Table 2.6 ‘Snakebite No.2’, above.

¹⁰⁹ The further issue of whether the criminal law may sanction only acts and may never sanction omissions is a separate theoretical issue which I will also address in section 11.2 in Chapter Eleven.

The third stage of the criminal justice process where harm becomes an issue is at the point of sentence. Here four problems arise when we must:

- a) identify the kinds of harm that are risked and caused by the wrongful conduct;
- b) decide how far (if at all) the harmful effects that are risked and caused in each case can fairly be taken into account when sentencing the offender;
- c) devise a system to rank and quantify the relevant harms; and
- d) find a way to combine the harm assessment with the other relevant aspects when quantifying the final sentence.

The problems of ranking and quantifying harm call for evaluative judgements, not only because of the link that the criminal law makes between the factual notion of harm and the normative notion of wrongdoing, but also because sentencing itself is an overtly evaluative and quantitative process. The word 'value' has two distinct meanings:¹¹⁰ 'to value' something is to decide on its equivalent worth in terms of something else (a quantitative aspect); 'a value' is a principle or standard that is thought to be important by an individual or a group (a normative aspect). Both of these senses of the word dominate the process of sentencing. Judges must assess how bad an offender's conduct was, how bad the effects were, and how bad the offender was, in order to select a punishment that reflects the value we place on each of those three elements. So, even though I have suggested that, considered on its own, the concept of harm is essentially a factual matter, its proximity to the normative notions of wrongdoing and fault in the criminal law and its important place in sentencing law both give rise to complex problems of evaluation.

At this point, however, it is important to distinguish between factual issues, evaluative issues, and normative issues. A standard, rule or principle is normative if it is 'used to judge or direct human conduct as something to be complied with' or 'proffers moral guidance, instruction or a basis for appraisive judgement.'¹¹¹ We often use the terms normative and factual in opposition in order to distinguish between moral and non-moral issues, however, to complicate matters, some philosophers like AJ Ayer and RM Hare have also made a distinction between 'fact' and 'value' in

¹¹⁰ *SOED* at 3542.

¹¹¹ See the entry for 'Normative' in Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 626. See also Posner RA, *The Problematics of Moral and Legal Theory*,

order to separate purely descriptive statements about the world from evaluative uses of language that indicate the imperative function of words (like 'good' for example) which carry a moral connotation.¹¹² Problems can occur in this area when we slip between the oppositional pairs by equating 'normative' with 'evaluative' and concluding that 'factual' issues must therefore be in opposition to 'evaluative' issues. But not every value is a moral value and it does not follow that every value-based assessment must necessarily involve a moral or normative evaluation.¹¹³ In fact, our investigations of both factual and normative concepts give rise to questions of evaluation, but they are evaluations of two different kinds and so in order to distinguish more clearly between them I will (where necessary) use the term 'factual-evaluative' when referring to our evaluations of factual issues like the degree and importance of harm and use the term 'normative-evaluative' when referring to the kinds of moral evaluations that we must make when assessing the degree and importance of the normative issues of fault and wrongdoing.

The remaining chapters of this thesis will explore these issues and suggest how we might respond to the challenge that each poses. This Part deals with the problems of definition and the difference between harm-doing, wrongdoing and fault. The following Part attempts to clarify the debates over the nature of harm and wrongdoing that arise in philosophical accounts of the criminal law and the debates over the proper extent of the criminal law. Part III applies the definitions of the three concepts of wrongdoing, harm and fault to actual cases in order to identify and evaluate the relative importance of the different categories of harm, and the final Part attempts to amplify our understanding of the different roles played by the factual and the normative aspects of a crime. It argues that our current criminal justice practices

(Harvard University Press, 1999) at 97-98, 112-113, 131 discussing the difference between moral and normative reasoning.

¹¹² See 'Fact-value Distinction' in *The Oxford Companion to Philosophy* above footnote 111 at 267; and Hare RM, *The Language of Morals*, (Clarendon Press, Oxford, 1952) Chapter Seven at 111: Description and Evaluation.

¹¹³ I suspect that a slip of this kind accounts for Stuart Green's criticism of the distinction which Mark Warr makes between the factual issue of harm and the normative issue of wrongdoing in his surveys of crime seriousness. See Green SP, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' above footnote 30 in his

properly give priority to the normative aspects of wrongdoing and fault over the factual aspect of harm. The thesis concludes by presenting an analytical model for structuring the sentencing process and evaluating the seriousness of a crime and describes how our responses to the factual aspect of harm can be controlled by the two normative aspects of wrongdoing and fault. Part IV also explores the various applications of the controlling principles that provide procedural and substantive limits on the kinds of harm that may be taken into account when sentencing offenders and the extent to which the state should be entitled to convict and punish offenders for the harm that may have flowed from their criminal conduct.

The greatest problem we face, once we have answered the question of what is to count as harm, is to decide how to respond to it: in preventive measures designed to minimise the risk of harm, in post-event measures designed to repair harm, and in punitive measures that respond to wrongful conduct that may have caused harm. I have suggested in section 1.2 of Chapter One that the problems caused by the disagreement over theories of wrongdoing that arise at the initial legislative stage have flowed through to complicate our responses to harm at the final stage of sentencing. I will argue in the next two chapters that this confusion need not persist if we adhere to the natural meaning of the terms harm and wrongdoing and make a determined effort to simplify our approach by keeping the two concepts separate at each stage, not only when we must decide upon the content of our criminal laws, but also when we must determine the rules for analysing the seriousness of a crime. It is important to bear in mind the difference between harm, fault and wrongdoing because it is almost always at the point where the essentially factual issue of harm becomes connected to the more complex normative concept of criminal wrongdoing that it attracts such descriptions as 'vague', 'treacherous' 'ambiguous' and 'essentially contested'. This suggests that while harm itself is not a normative term, its close proximity in the criminal law to the normative concepts of crime, fault and wrongdoing will require us to meet a number of moral challenges before we can construct a decision making model that can fairly take harm into account. For this reason we must consider the meaning, not only of harm, but of wrongdoing and fault as well, and this task will be taken up in Chapter Three.

footnote 33 at 1549, criticising Warr M, 'What is the Perceived Seriousness of Crimes?' (1989) 27 *Criminology* 795.

Chapter Three

The Nature of Wrongdoing and Fault

3.1 Defining wrongdoing

The concept of wrong, like the concept of harm, is both easy to define and difficult to apply in practice. In *Crime, Reason and History* Alan Norrie showed that the concept of criminal wrongdoing has always been ‘a highly contingent and contested social and historical concept.’¹¹⁴ However, when we use the term, others generally have no difficulty in understanding what we intend to convey. As RM Hare and JL Mackie have pointed out, when we say that something is wrong we express our hostility towards it and indicate that we disapprove of it, and as HLA Hart explained, when we declare certain kinds of action to be wrongdoing we want to make clear our attitude ‘that these actions are not to be done’.¹¹⁵ The contests over the issue of wrongdoing arise, not because we do not understand what the word means, but when we disagree over whether a particular kind of conduct should be viewed as wrong and debate whether there ought to be a law against it. Central examples of wrongdoing are usually uncontroversial and, just as in the case of harm, it is usually at the boundaries of the law that opinions differ. At this point, conflicting values make the decision difficult and when we turn to deeper moral theories for guidance we tend to find only further sources of disagreement.

The word wrong can function as an adjective or a noun. The dictionary gives an early use of the adjective as ‘twisted, bent’ or having ‘a crooked or curved form’.¹¹⁶

¹¹⁴ Norrie A, *Crime, Reason and History*, (Weidenfeld and Nicolson, London, 1993); ‘Michael Moore’s Deviation’ (1999) 19 *Oxford Journal of Legal Studies* 111 at 120; and *Punishment, Responsibility and Justice: A Relational Critique*, (Oxford University Press, 2000) at 102.

¹¹⁵ Hare RM, *Essays on the Moral Precepts*, (University of California Press, 1972) at 100; JL Mackie, *Persons and Values*, (Oxford University Press, 1985) at 213; Hart HLA, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) at 6.

¹¹⁶ *SOED* at 3732. Our word for a civil wrong is also derived from the Latin term *tortus* meaning ‘twisted or crooked’: Fleming JG, *The Law of Torts*, 9th ed, above footnote 56 at 3. Similarly, the New Testament word for sin can also be traced to its etymological roots in the Greek term *hamartia* originally meaning ‘missing a target’. I am grateful to Peter Davis for this point.

Although this definition is long obsolete, the image contained within it provides a clue to understanding the concept of a wrong as ‘a deviation from a standard, rule, convention or principle’; ‘something deviating from equity or goodness’; ‘contrary to what is approved, proper, or deemed to be right’; ‘incorrect’.¹¹⁷ As the following examples show, the word wrong can give rise to two different connotations; it can contain a moral dimension or it can have a connotation of poor fit or mismatch with a standard that is not necessarily moral, but may merely be conventional, aesthetic, desired or convenient.

Moral connotation:

‘Everyone thought that he was in the wrong.’

‘It is wrong to steal.’

‘No man shall profit by his own wrong.’

‘She wronged him both in thought and in deeds.’

‘It was wrong to lie there all day doing nothing while others slaved in the hot sun.’

Non-moral connotation:

‘That tie looks wrong with that shirt.’

‘My hair is all wrong today.’

‘We took the wrong turn and ended up on the freeway.’

‘He thought for several minutes, but came up with the wrong answer.’

In these latter cases, when we say that someone has taken a wrong turn or come up with a wrong answer, we are not necessarily indicating that they are to be condemned for their conduct. Matters are different, however, when we use the term wrongdoing. The use of this term indicates the breach of something more than a merely conventional, convenient or aesthetic standard and contains the connotation that the conduct is reprehensible, unlawful or immoral in some way. Wrongdoing is defined as ‘action or behaviour contrary to morality or law, misconduct; a moral or legal transgression’.¹¹⁸ Wrongfulness is therefore a quality that we ascribe to an action, or to some particular behaviour or conduct. There is no necessary condition that the behaviour under consideration be limited only to positive actions, and no requirement that the conduct must cause a particular result. So, unlike harm-doing, which is

¹¹⁷ *SOED* at 3732.

¹¹⁸ *SOED* at 3733.

determined by an assessment of the effects of the conduct, wrongdoing is determined by a special feature of the conduct or behaviour itself.¹¹⁹ That feature is the fact that it deviates from a rule, norm or standard of conduct thought to be right, and it is this feature that points up most clearly the normative or moral dimensions of the concept. Consequently, we can define wrongdoing in its ordinary sense as conduct or behaviour that deviates from a rule that is thought to be right. Our characterisation of any conduct as wrongful therefore depends, not upon the fact that we have detected an intrinsic or objective quality of wrongfulness within the conduct itself, but upon the fact that we have recognised that the conduct does not conform with a rule of conduct that we think is right.¹²⁰

3.2 Exploring the definition

The negative notion of wrong implies the existence of a corresponding positive notion of something thought to be right or good. This means that we can reformulate any legal rule or moral prohibition in terms of the good thing that the rule seeks to protect or the desirable state of affairs that it seeks to achieve or maintain. These identifiable objects encapsulated in our rules, norms and standards of behaviour are themselves underpinned by the needs and the values of the individual, group or community that provides the judgement that the conduct is wrong and that the rule forbidding it is right.¹²¹ So, for example, the moral prohibition against lying can be explained by pointing to the value that we place on honesty; the legal prohibition against murder by the value that we place on the existence of individual human life;

¹¹⁹ Utilitarians or consequentialists argue that we should determine the wrongfulness of conduct only by reference to its consequences. This must be a prescriptive account of the concept and not a descriptive claim because the ordinary meaning of the word does not contain any necessary requirement of effect. The difficulty for utilitarians lies in having to convince us to adopt an interpretation of the concept that conflicts with ordinary usage. If causing harm amounted to wrongdoing, we would not need the separate concept of wrong.

¹²⁰ Of course, the underlying reasons why we judge conduct to be right (and wrong) may well differ.

¹²¹ I do not intend to suggest by my use of the terminology 'the object of a rule' or 'the good thing that the rule seeks to protect or the desirable state of affairs that it seeks to achieve' that moral value is justified by some kind of consequentialist calculus or that it is governed by any particular theoretical purpose. Rather, I am suggesting that a particular conception of 'the good' or 'right behaviour' is necessarily implied in the notion of wrongdoing and that it is possible to identify as a matter of fact what the immediate object of any moral or legal prohibition is.

the law against rape by the importance of human dignity, sexual autonomy and bodily integrity; and the existence of parking rules by the desire to provide everyone with a fair chance to use shared community facilities. The normative claim that something is wrong is a claim that calls for justification. To justify a community's legal or moral prohibitions against wrongdoing, we would need to show how the objects of these rules fit into the community's overall conception of what a good life in a good community consists of and show how conduct that breaches those rules has the capacity to destroy the basis of a shared life together.¹²² Taking the example of the moral prohibition against lying, we could explain the value that people place on honesty by pointing out that, in order to live together, people need to be able to rely on the fact that others are telling the truth most of the time.¹²³

This conception of the good that is contained in the notion of wrongdoing not only justifies the description of the term as complex, morally loaded and unavoidably normative, it also provides a way to evaluate and rank wrongs. By contrast with harm, which is readily understood to be a matter of degree, it may appear at first glance that ranking wrongs by degree is impossible; conduct either conforms with the rules (in which case it is not wrong at all) or it is in breach of the rules (and is therefore completely wrong).¹²⁴ However, it is possible to compare the relative seriousness of different acts of wrongdoing by reference to the relative importance of the object of the rule that has been breached. Given that every legal rule forbidding a particular

¹²² In the case of a personal or private rule, the rule maker would still have to be able to justify how following that rule contributed to his or her own conception of the good life. By analogy with the point made in the text, they might even say 'I just couldn't *live with myself* if I did that.'

¹²³ As I explain in Chapter Eleven this general moral prohibition is not enough to justify the criminalisation of conduct like lying to others. I argue that we must first satisfy the additional requirement of disrespect for the equal value of others. I suggest that lying to others is not always the result of an attitude of disrespect, and that it is proscribed by the law only when that attitude is present and when the conduct is seen as risking harm to others.

¹²⁴ This belief sometimes complicates the surveys on the seriousness of crimes; see Warr M, 'What is the Perceived Seriousness of Crimes?' (1989) 27 *Criminology* 795, especially at 800 and 818-819 where a substantial minority of respondents refused to rank the conduct samples for moral gravity on the grounds that 'all crimes are equally wrong morally'. See also Fletcher GP, *Basic Concepts of Criminal Law*, (Oxford University Press, 1998) at 78-79 discussing wrongdoing and wrongfulness.

kind of conduct necessarily has an identifiable factual object,¹²⁵ it follows that the seriousness of the wrong can be rated by reference to the values which sustain that object. I will explore the usefulness of this conception of a wrong further in the sentencing model that is presented in Chapter Twelve where I will argue that it can be used in two ways. The first is to assist us in the task of ranking and evaluating the seriousness of crimes. The second is to use the concept of a wrong, combined with the concept of fault, to help construct a remoteness test when assessing harm. However, using the concept in this way becomes possible only once we have resolved the remaining challenge of defining wrongdoing, which requires us first to disentangle it from the concept of harm and then to explain its close connection to the concept of fault.

The word wrong, when used as a verb, can also describe conduct, both internal and external. By contrast with the case of doing harm to another, it is possible to wrong another person solely in the realm of thought or internal conduct, for example, by thinking less of them because of their race or religion, or by mistakenly attributing a corrupt motive or immoral conduct to them. Thinking about another in these ways wrongs them whether or not the thought is translated into deeds and regardless of whether any harm results from it. A person can also wrong another by external conduct, for example, by treating them ‘unjustly, unfairly or harshly’; by ‘violating’ them, ‘doing damage’ to them; or by causing ‘undeserved physical harm or injury’ to them.¹²⁶ It is here that the concept of wrongdoing appears to overlap to a large extent with the concept of harm-doing, however, this usage still carries with it the extra

¹²⁵ I would also argue that even idiosyncratic personal prohibitions exhibit this characteristic. So, if a person states that it is wrong to use the words ‘ongoing’ or ‘pro-active’ they are claiming at the same time that there is a right way to construct and use words in the English language. By contrast, a person who states that it is wrong to step on cracks in the pavement and that it is bad to use the word ‘green’ will be thought to hold irrational beliefs, unless they can point to the conception of the good that can justify their private rules to others. Their private conviction that ‘something terrible will happen if I do these things’ may justify a person adopting that rule for themselves, but it cannot convince others to follow the same rule. However, even if the belief itself is thought by others to be irrational, these kinds of private rules still have an identifiable, good object from the point of view of the individuals who feel compelled to follow them, ie avoiding overwhelming or crippling feelings of distress, anxiety and fear. If their life is not worth living if they step on a crack, then adopting the rule may be a rational course, even if the underlying belief is itself irrational.

¹²⁶ *SOED* at 3733.

normative assessment that the harmful conduct has been done in violation of a rule, norm or standard that forbids it. This aspect is implied in the notions of violation, of desert, and of injustice. The definition highlights the fact that one way (perhaps even the main way) of wronging another person is to do something that harms them in breach of an accepted rule or norm of behaviour that forbids it. But the verb is by no means a straightforward synonym for harm-doing. The example given by the dictionary at the entry for harm reinforces the point made above that the two concepts are not the same: 'She had done wrong, she only hoped that she had done no harm.'¹²⁷ The common reply to an accusation of wrong-doing 'Yes, but where's the harm in it?' also suggests that the two are separable concepts. These definitions and examples make it clear that the gist of each concept is different, even in complicated cases where the two concepts meet, ie, where conduct is viewed as being both harmful and wrong.

Even though the concepts of harm and wrong are often linked, it is not always the case that they will occur together. Given that each has a different focus, it follows that it is possible to harm without wronging, and to wrong without harming. It is possible to make someone worse off without wronging them, for example, by terminating a worker's employment because they are unsuited to their position, or by driving a competitor out of business by offering a superior product at a lower price. By contrast, it is possible to wrong someone without necessarily harming them, for example: by lying to them; by mistakenly attributing bad motives or bad conduct to them; or by spreading untrue rumours about a person that are not believed by those who hear them. In the legal context we also find examples, sometimes referred to as *damnum absque injuria*, where harm may have been done without there being any legal wrong. Examples include: publishing true but devastating facts about a person under privilege; killing another in self defence; or wounding an enemy soldier in wartime. Conduct that is legally wrongful but not necessarily harmful can also be found, for example: smoking cannabis to relieve the pain and loss of appetite caused by cancer treatment; driving while disqualified; or offering a bribe to a public official or member of parliament that is rejected.

Simple harm-doing does not automatically equate to wrongdoing – something more is required. As we saw in Chapter Two, not all harm causing conduct is viewed

¹²⁷ *SOED* at 1191. The quote is from EM Forster.

as wrong even though its occurrence may be greatly regretted by the community. Cases characterised as pure accidents provide the clearest example of the way that a person can be the agent of harm but not be seen as either legally or morally in the wrong. An example would be where a small child, wanting to play hide and seek, has crept into a cardboard box that has been put out for rubbish collection and is crushed when the operators of a rubbish compactor, unaware of the child's presence, scoop the box into the machine. The operators may be filled with feelings of anguish, regret, and even (unwarranted) guilt for killing the child,¹²⁸ and although we could validly say that the operators harmed the child (because their conduct clearly made the child worse off) we would not say that the operators had done anything wrong.

To justify describing conduct as harmful we must be able to point to its adverse effects that make someone or something worse off, whereas the characterisation of conduct as wrong requires us to identify the rule or standard of behaviour that the conduct has breached and show why the rule is thought to be right. So, if we were analysing a case of incest or sexual abuse of a child by a parent in terms of the harm risked by the forbidden conduct, we might point to the long-term psychological or short-term physical damage done to child victims or the possibility of genetic defects in any potential offspring that might result from the sexual union. When accounting for the wrongfulness of this kind of conduct, however, we would explain the community's views on the nature of the relationship of trust and care that should exist between close family members and its ideal conception of sexual relations that emphasises free consent by mature partners of full capacity. This kind of abusive incest is condemned and criminalised by communities not only because it risks harm but also because it is an unthinkable betrayal of the parental role for parents to use

¹²⁸ This feeling is similar to the well documented phenomenon of 'survivor guilt'. See also Lerner MJ, 'The Justice Motive in Human Relations' in Lerner MJ & Lerner SC (eds), *The Justice Motive in Social Behavior*, (Plenum Press, New York, 1981) 11 at 21: humans have such an unshakeable feeling for the concepts of justice and responsibility that innocent victims easily tend to believe that they somehow deserved their fate, and those who suffer bad things convince themselves that their subsequent experiences contain good compensating rewards. See also Morris, N 'Nonmoral Guilt' in Schoeman F (ed), *Responsibility, Character and the Emotions*, (Cambridge University Press, 1987) 220.

their children for sexual pleasure.¹²⁹ In declaring that this conduct is wrongful, a community is responding not only to the possible effects on the community and its members, but at the same time it is also responding to the social meaning of the conduct, considered in the abstract and in the light of the values through which the community defines itself.¹³⁰ These values can be read from the kinds of conduct that a community declares to be wrongful.¹³¹

In the case of incest – an almost universal wrong – we can see clearly the differences between the focus of wrongdoing (the social meaning of the conduct itself) and the focus of harm (the actual effects of the conduct). However, it is not always so easy to separate the two aspects. When we turn to another classic wrong like wounding, the task is more difficult because the wrongful act of invasion (eg, a stabbing) and the initial harm (the resulting wound) occur at the same time and are very closely related to each other. Even so, the meaning of the invasion itself and the

¹²⁹ The importance of this aspect is highlighted in those jurisdictions where incest laws have been extended to cover situations where a step-parent has sexual intercourse with a step-child and are no longer limited to cases where a close genetic relationship exists. See, eg, the Queensland *Criminal Code 1899* incest provision, s 222(5), which expands the definition of lineal descendant to include a 'half, adoptive or step relationship.' Section 44 of the Victorian *Crimes Act 1958* has also been amended to forbid sexual penetration of step-children or children of a defacto spouse.

¹³⁰ See: Garland D, *Punishment And Modern Society: A Study In Social Theory*, (Oxford University Press, 1990); 'Sociological Perspectives on Punishment' in Ashworth A & von Hirsch A (eds), *Principled Sentencing*, 2nd ed, (Hart Publishing, Oxford, 1998) 381; Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 189; Dan-Cohen M, 'Basic Values and the Criminal's State of Mind' (2000) 88 *California Law Review* 759; Kahan DM, 'Social Influence, Social Meaning, and Deterrence' (1997) 83 *Virginia Law Review* 349 and 'Social Meaning and the Economic Analysis of Crime' (1998) 27 *Journal of Legal Studies* 609; Lessig L, 'The Regulation of Social Meaning' (1995) 62 *University of Chicago Law Review* 943 and 'Social Meaning and Social Norms' (1996) 144 *University of Pennsylvania Law Review* 2181; Garvey SP, 'Punishment as Atonement' (1999) 46 *University of California at Los Angeles Law Review* 1801; Marshall SE & Duff RA, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7; and Braithwaite J, *Crime, Shame and Reintegration*, (Cambridge University Press, 1989). Gardner J & Shute S, 'The Wrongness of Rape' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 193 discuss the social meaning of the crime of rape and attempt to tease out the aspect of wrongfulness from the aspect of rape's harmfulness. I discuss their account of rape in section 9.3 of Chapter Nine.

¹³¹ I return to the crime of incest in Chapters Ten and Eleven.

effect of the invasion on the victim are two distinct aspects of the crime, as evidenced by the fact that we do not measure the seriousness of the invasion of the victim's rights by measuring the depth of the resulting wound.¹³² This is not only because wounds of similar depth differ in their results (a wound to the fleshy parts of the body may be much less serious than a similarly deep cut that pierces a vital organ), or because a stabbing can result in more than physical harm, but because there is more to the invasion than the fact of the knife cutting into the body. The commonly used word 'invasion' is a usefully ambiguous term to adopt when describing crimes, precisely because it reflects the fact that we see the invasion as occurring at two levels. On the one hand, there is the purely physical piercing of the body – just as there might be a purely physical penetration of the child's body in the case of incest. But, in the same way as a case of incest involves something more than the physical act and can be read as a betrayal of the role of parenthood, so in the case of wounding we can detect something else beyond the physical. In this case it is the more metaphorical 'invasion' of the victim's autonomy, the denial of their right to self-determination and the disrespect for the victim that we read into the conduct, which fills out our account of the wrong.¹³³ Both aspects are important when we assess the seriousness of the crime.

Performing a consented-to medical procedure that involves a technical wounding is not wrongdoing, but this is not because it does not risk any bodily harm, nor because it is necessarily done with a good motive, but because it is not a denial of the victim's rights to self-determination. The same procedure, done against the patient's will, would be wrongdoing, even if it improved the unwilling patient's health in the long-term. In this case, the key to determining the wrongfulness of the conduct lies in the social meaning of the act as a failure to respect the victim as a person of equal value, which is evidenced by the invasion of the victim's interest in autonomy and bodily integrity. However, we would not necessarily respond to the doctor's wrongful act in the same way that we would respond to a different act of wounding that was motivated by hatred and accompanied by an intention to cause severe pain and damage. In both cases the immediate harm done by the wound may be identical in

¹³² Though we once did. See the Laws of Aethelbert of Kent, circa 602, in Griffith B, *An Introduction to Early English Law*, (Anglo-Saxon Books, Frithgarth, 1995) 'law 67' at 39.

terms of the victim's pain and suffering. The degree of disrespect for the victim's autonomy and right of self-determination might also be the same, but our responses to the two events may well be quite different. These differences in our responses to prima facie cases of wrongdoing can be accounted for by the aspect of fault.

3.3 Wrongdoing and the issue of fault

The concept of fault is closely related to the aspect of wrongdoing but it has a different focus. Whereas wrongdoing reveals the social meaning of the conduct considered in the abstract case, the aspect of fault reveals our specific reading of the individual wrongdoer's case as we interpret it in its particular context. An examination of fault focuses on the person whose conduct has been impugned and requires a normative evaluation of their responses to the circumstances that they have found themselves in and a judgement of the values that have guided their choices. Our judgements of fault and wrongdoing are both derived from the universal human propensity to interpret and evaluate the behaviour of others and our tendency to moderate our overall assessments of that behaviour in the light of our perceptions of the motives and intentions which accompany it.¹³⁴

These judgements that we pass on others also depend on our perception of the personal circumstances of the individual concerned. The story of the widow's mite offers a clear example of this particularised approach to judging others. Beyond the abstract social meaning of the widow's charitable and religious act of donating to the offering box (it is good for anyone to give to charity), we invest the event with additional meaning that is derived from our interpretation of what the act must have meant to her, in her personal circumstances of poverty (it was especially good for this extremely poor widow to give to charity). So, although others may have donated more than the widow, and bestowed a greater benefit upon the community, the factual aspect of overall benefit is subordinated when we judge the full meaning of the event,

¹³³ The notions of consent, self-determination and autonomy alone do not provide the full account, however. The courts impose limits on those rights, eg, *R v Brown* (1993) 2 All ER 75. I discuss this issue further in sections 11.2 and 11.3 in Chapter Eleven.

¹³⁴ Brown DE, *Human Universals*, (Temple University Press, Philadelphia, 1991) at 134-139. See also Hart HLA, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) at 183-184; Kahan DM & Nussbaum MC, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Colorado Law Review* 269.

considered from both the abstract and the particular points of view,¹³⁵ and compare our response to the widow with our response to the conduct of others. A similar phenomenon can be observed in the criminal context. Not only can the aspect of fault have a great effect on general penalty ranges,¹³⁶ but in specific cases the intention and the motive of the offender can have either a mitigating or an aggravating effect within an established range.

We generally say that a person is at fault when we think that their individual responses to their circumstances are not as they should be, that is, when their responses deviate from those that are thought to be right.¹³⁷ A conclusion that someone is at fault for their wrongful conduct, and so deserves to be blamed for it,¹³⁸ represents two assessments: the first is that the conduct itself deviates from a rule or norm thought to be right; and the second is that the person's individual responses to their circumstances have deviated from those that are thought to be right and that their choices have not been guided by proper values. I want to argue in this thesis that these two deviations – in conduct and in personal responses – are the two key normative aspects of a crime; that each has a different role within the criminal law; and that a separate analysis of each is required when we are assessing the seriousness of a crime for sentencing purposes.

If we return to the case of the well-meaning but over-zealous doctor, our reading of the doctor's intention to do good may lead us to judge the seriousness of her crime as lower by comparison with the case of the vicious attacker even though both offenders may have caused a similar wound. By contrast, if an offender sought by his conduct deliberately to maximise the suffering of another, that fact would lead us to

¹³⁵ In these examples I prefer to use the terms abstract versus particularised meaning rather than objective versus subjective meaning, because the assessment of the widow's conduct is not derived from what it actually meant to her, but upon the objective meaning that we ascribe to her conduct considered in the light of her subjective circumstances - this combines both objective and subjective aspects.

¹³⁶ Compare the penalties for murder, manslaughter and causing death by dangerous driving.

¹³⁷ *SOED* at 923 defines a fault as a 'deficiency, lack or want of'; a 'default, failing, neglect'; or 'defect, imperfection, or blemish of character'. The verb to fault is to 'be wanting'; to 'come short of an accepted standard, fail'; or to 'be deficient or lacking in' some quality.

¹³⁸ See Simester AP, 'Can Negligence be Culpable?' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 85 at 88, who argues that our judgements of blame combine 'person with action'.

characterise his offence as a more blameworthy act of disrespect to the values embodied in the community's criminal laws. These examples show that the aspects of fault and motive often moderate our assessment of an offender's overall conduct and demonstrate that although the issue of harm is an important and defining aspect of many crimes, it does not always dominate our responses in all cases.

Describing someone's conduct as wrong adds an unavoidably negative normative element to the assessment of that person's conduct, which exists regardless of whether it has made anything worse off. This often controversial element arises from the assessment that the rule forbidding the conduct is right. Core instances of conduct commonly thought to be wrong, like lying, cheating, murder, adultery, theft and rape contain plainly negative and pejorative overtones and are the kinds of wrongdoing often described as wrong in themselves or *mala in se*. These cases also contain another in-built normative element within their definition – the element of intention. Lying is not merely saying something that is untrue, it is deliberately or knowingly making a statement that is not true, and cheating is not an accidental, but an intentional, act of deception or trickery. In these cases the close link between fault and wrongdoing is reinforced within the definition of the wrong itself. However, as noted above, in addition to using the word to describe conduct that is disapproved of on moral grounds, we also use the word wrong to indicate conduct that is contrary to conventional norms of behaviour that are held to be merely convenient, useful or traditional. So, for example, we might say to a child who has jumbled up the cutlery when helping to set the table for dinner: 'No Dear, you have done it the wrong way.' Nevertheless, although we might characterise the task as wrongly done and the table as wrongly set, in everyday life we might shrink from describing the child herself as a wrongdoer.

If the child had never previously been shown how to set a dinner table, we would not blame her for jumbling up the cutlery because her act was done in ignorance of the conventions. We would make a distinction between judging the child's conduct of the task (which was wrong in factual terms because it deviated from the rules for setting tables) and the issue of judging the child herself (who was not being naughty but was simply trying to help). Our assessment of the child might well be otherwise if we knew that she had been doing the task properly for years, and had deliberately set the table badly on this occasion in a fit of temper. In these circumstances we would not hesitate to label the child as having done wrong and as being at fault even though

the rule that has been breached is merely one of convention or convenience. What we object to in this case is not only the outcome of the conduct (ie, the fact that the knives and forks are on the wrong side of the plate), but the attitude of disrespect that we take from the child's conduct itself, considered in the light of her knowledge and proven capacity to get the task right. In everyday cases, the description of wrongdoer is reserved either for cases where the rule breached is one thought to be intrinsically right on moral grounds or for cases where the conventions have been deliberately and needlessly broken in a way that is viewed as blameworthy. Cases of intrinsic moral wrongfulness seem to contain this element of fault by definition, but in cases where the conduct is simply contrary to a norm thought to be useful or conventional, we often require an explicit demonstration of fault beyond the proof that the conduct is in breach of a rule before we can justify condemning the person committing the breach as a wrongdoer.

When we turn to the criminal law, however, the everyday reluctance to describe as a wrongdoer someone who has breached a rule that is not based on purely moral grounds tends to disappear. Regulatory offences, and those sometimes described as *mala prohibita*, are those that have been declared to be wrongful because the rule is convenient or conducive to orderly community living, and these offences do not always require the explicit proof of an element of evil intent or fault.¹³⁹ Examples of this type of offence might include taking abalone without a licence, smuggling, parking violations, etc. In these cases, the legislature relies on our habits of obeying

¹³⁹ A recent discussion of the differences between these two kinds of offences may be found in Simester AP & Shute S, 'On the General Part in Criminal Law' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 1 at 10-12; Husak DN, 'Limitations on Criminalization and the General Part of Criminal Law' in the same volume at 13; Duff RA, 'Rule-Violations and Wrongdoings' in the same volume at 47; and Alldridge P, 'Making Criminal Law Known' in the same volume at 103 (who traces the disagreements over the usefulness of the distinction from Blackstone's time to the present). See also Archibald BP, 'Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (with Ruminations on Restorative Justice)' (1998) 40 *Criminal Law Quarterly* 263 at 272-273, discussing the history of English, American and Canadian attitudes to 'real crimes' and the appropriate mental elements; Reaume DG, 'Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination' (2001) 2 *Theoretical Inquiries in Law* 349; and Feinberg J, 'Harm to Others - A Rejoinder' (1986) 5 *Criminal Justice Ethics* 16 at 23.

the law and harnesses the social emotions of guilt and shame that are associated with breaking the law to achieve important community objectives like revenue raising, public health and safety, and fair sharing of community resources, and I will examine the reasons why these kinds of conduct are appropriately criminalised in Chapter Ten. In both cases of crimes *mala in se* and those *mala prohibita* we can truly say that a person convicted of the offence has done the wrong thing, because in both cases a rule thought to be right has been broken. The issue that distinguishes the two kinds of wrong is the way in which we establish the extra aspect of fault that justifies punishing as wrongdoers, those whose conduct has breached the rule. The difference is revealed by the comparisons that we make. In the case of crimes of intrinsic moral wrongfulness the fault element is expressly supplied in the definition of the crime itself and so the conditions of blameworthiness that justify punishing the offender must be established each time by comparing the facts of the case with the rule and proving the existence not only of the forbidden conduct but also of the element of fault.

In the cases *mala prohibita*, however, we appear to impute to the offender the requisite degree of background knowledge of the community's rules and the capacity to act properly that justifies a finding that the unlicensed drivers or illegal abalone divers are also at fault. In part, this attribution of fault can be justified by pointing to the offenders' demonstrated unwillingness to bind themselves to observe the same constraints on their behaviour that are observed by others and their willingness at the same time to benefit from the forbearance shown by others.¹⁴⁰ This extra dimension

¹⁴⁰ The 'free-riding' or 'unfair advantage' theory of criminal wrongdoing is argued for in: Morris H, 'Persons and Punishment' (1968) 52 *The Monist* 475; Murphy J, *Retribution, Justice and Therapy*, (Reidel, Dordrecht, 1979) at 77-115, 223-249; Sadurski W, *Giving Desert its Due: Social Justice and Legal Theory*, (D Reidel, Dordrecht, 1985) at 221-260; Sher G, *Desert*, (Princeton University Press, 1987) at 69-90; and Dagger R, 'Playing Fair with Punishment' (1993) *Ethics* 473. It is also discussed in Burgh RW, 'Do the Guilty Deserve Punishment?' (1982) 79 *Journal of Philosophy* 193; Murphy JG, 'The State's Interest in Retribution' (1994) 5 *Journal of Contemporary Legal Issues* 283; von Hirsch A, *Censure and Sanctions*, (Clarendon Press, Oxford, 1993) at 6-8; and Shafer-Landau R, 'Retributivism and Desert' (2000) 81 *Pacific Philosophical Quarterly* 189 at 205-207. The version presented by Michael Davis, *To Make the Punishment Fit the Crime*, (Westview Press, Boulder, 1992) has been criticised in Scheid DE, 'Davis, Unfair Advantage Theory and Criminal Desert' (1995) 14 *Law and Philosophy* 375. I do not adopt this theory as a justification of punishment.

of comparison establishes fault, but it is implied from the broader circumstances, and express proof of a specific fault element is not required each time. An important feature of our deliberations about fault is the fact that we often make an inference of fault from our observations of a person's conduct. In offences *mala prohibita* our knowledge that others manage to avoid the forbidden conduct leads us to conclude that these offenders *could* have conducted themselves differently and, as I will explain in Chapter Ten, our reading of the attitude conveyed by their conduct leads us to conclude that they *should* have acted differently. So, in these cases, we simply compare the person's conduct with the conduct specified in the rule to establish the factual breach, but, instead of requiring express proof of a specific fault element, we take a wider view and we judge the offender's conduct as conveying an attitude of disrespect and in this way we establish the conditions of implied rather than intrinsic blameworthiness.¹⁴¹

Even though our criminal laws may have different origins, either in our agreement that certain conduct is inherently morally wrong or in our agreement that prohibiting the conduct serves the important needs of the community for regulation, coordination and cooperation, all laws must be justified first by pointing to the object of the rule and the community values that underpin it and then, as Feinberg has suggested, by showing that no other (or better) way of protecting those values can be found.¹⁴² If these conditions are met, then the breach of either kind of rule has been shown to have the capacity in some important way to destroy the basis of our community life, and, provided that the actions of those who breach these rules can be interpreted as acts which do not respect the interests in pursuing and enjoying the good life that all within the community share, the offenders are labelled as wrongdoers deserving of punishment. I will investigate further the difference between these two kinds of crimes and the nature of the fault elements which are associated with each one in Chapter Ten, where I will argue that the underlying link that accounts for our

¹⁴¹ So, as Simester and Shute point out 'both types of offence may give rise to significant levels of censure.' Simester AP & Shute S, 'On the General Part in Criminal Law' above footnote 139 at 11. I discuss this aspect in greater detail in sections 10.3 and 10.4 of Chapter Ten.

¹⁴² See: Feinberg, *Harmless Wrongdoing* at xix; Ashworth A, *Principles of Criminal Law*, 3rd ed, (Oxford University Press, 1999) at 50-51, 'Is The Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225; and Lacey N, *State Punishment*, (Routledge, London, 1988) at 120.

assessments of fault in each case lies in our shared desire to be respected by others as persons of equal dignity, worth and value.

This discussion has shown that just as harm-doing and wrongdoing are closely related (because criminal wrongdoing is often defined in terms of causing harm) so too are the aspects of wrongdoing and fault closely linked when we must consider our response to the whole event (because our responses to each specific act of wrongdoing cannot be determined without considering the nature of the person who committed it and the circumstances in which it occurred). However, although these three aspects are all closely related, each provides a different focus that requires separate assessment when we are considering the appropriate community response to any crime. The normative aspect of wrongdoing points up the importance of the social meaning of the conduct itself and the reasons why we think that it ought to be criminalised; the normative element of fault or culpability requires us to evaluate the specific, contextual aspects of the individual offender's responses to their circumstances; and the aspect of harm leads us to consider the impact of the conduct on the world. Each of these aspects will be examined in further detail in Part III.

3.4 The value of an open definition of the concept of wrongdoing

I have argued that we can define the essence of wrongdoing in the legal context as conduct that deviates from a rule or norm of conduct that is thought to be right. This definition is broad and content-neutral and is not tied to the criminal law – it could equally well apply to any transgression or any legal wrong, whether criminal or civil. It leaves undone the hard work of identifying and precisely defining the conduct that is to be forbidden and establishing the reasons why it is thought to be right to forbid it. Neither does this definition explain how to decide whether to impose civil or criminal sanctions on the conduct once we have decided that there ought to be a law against it.¹⁴³

Interestingly, but perhaps not surprisingly, this brings us to much the same point that Glanville Williams arrived at when he defined a crime as 'a legal wrong that can be followed by criminal proceedings which may result in punishment' and 'an act that is condemned sufficiently strongly to have induced the authorities ... to declare it to

¹⁴³ See the discussion in section 11.4 in Chapter Eleven.

be punishable before the ordinary courts.’¹⁴⁴ Just as his definition did not purport to tell us what sort of conduct should be made a crime, this definition does not provide a test that identifies the kinds of conduct that should be classified as wrongdoing. These content-neutral definitions¹⁴⁵ like Winfield’s definition of tortious liability as that which ‘arises from a breach of a duty primarily fixed by the law [owed] towards persons generally and ... redressible by an action for unliquidated damages’¹⁴⁶ simply tell us how the terms are used, and what we mean when we use them. They leave us with the responsibility of making our own decisions and justifying our choices¹⁴⁷ and because of this they are often criticised as empty, circular or meaningless.¹⁴⁸ However, I want to suggest that these content-neutral definitions are not only useful, but also that such ‘empty’ definitions are essential if debate over the precise content and practical form of the criminal law is to proceed.

If we look at the definition of wrongdoing we find that, by contrast with harm, where the test was suggested by its ordinary meaning, there is no guidance given by the definition of the term as to the test that will identify instances of wrongdoing. For this reason, many individuals have looked towards religion or theories of ethical value to fill the gap and tell us how to recognise a wrong, but while this may resolve matters for individuals on a personal level, it does not provide a community with a solution

¹⁴⁴ Williams G, *Textbook of Criminal Law*, 2nd ed, (Stevens & Sons Ltd, London, 1983) at 27 and 28.

See also Williams G, ‘The Definition of Crime’ (1955) 8 *Current Legal Problems* 107 and Ashworth A, ‘Is The Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225.

¹⁴⁵ Michael Moore, *Placing Blame*, above footnote 19 at 32-34 argues that areas of the law (like the criminal law) that are capable of having a content-neutral general part and a special part are distinguished by the fact that they have an underlying goal that can make sense of the general part. He contrasts these areas of the law from those like property law which have no single goal and therefore no avenue for the development of a general part. For criticism, see Husak DN, ‘Limitations on Criminalization and the General Part of Criminal Law’ in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 13.

¹⁴⁶ Winfield PH, *The Province of the Law of Tort*, (Cambridge University Press, 1931) at 32.

¹⁴⁷ For further elaboration of this issue see section 8.2 of Chapter Eight.

¹⁴⁸ Glanville Williams himself recognised this source of criticism; see *Textbook of Criminal Law*, 2nd ed, (Stevens & Sons Ltd, London, 1983) at 27-28. See also: Hart HM, ‘The Aims of the Criminal Law’ (1958) 23 *Law and Contemporary Problems* 401 at 404; Lacey N & Wells C, *Reconstructing Criminal Law*, 2nd ed, (Butterworths, London, 1998) at 4; Brown et al, *Criminal Laws*, 3rd ed,

because in over two thousand years of debate, we have been unable to agree on any such theory. Given that we disagree on these theories, continued debate is inevitable, but if we delay action until we reach consensus, then we cannot act at all. Consequently, we need to ground our debates by focusing on the matters that we can agree upon so that we can avoid endless disputation over the things that divide us. Our community conversations about crime and punishment are an important way of managing our disagreements and may be seen as part of the point of the social practice of law. As the community debates each specific practical issue,¹⁴⁹ its values are defined and illuminated, the possibility of consensus on individual issues is increased, and the community is able to change its rules to reflect its changing values without waiting for further agreement on matters of underlying theory. These conversations are impossible without a common understanding of the meaning of the abstract, normative concept of wrongdoing that remains independent of the contested theories of value that divide us.¹⁵⁰ It is the very emptiness of the concepts of wrongdoing and crime that allows the law to develop case by case because it is only when the debate on individual issues reaches a point where most of us are able to fill that open space from within our own guiding theories and beliefs, that we can find a path to consensus.

The openness of these concepts, when combined with our shared understanding of their meaning and our shared community values, enables us to make decisions and go on together. So, from the point of view of managing disagreement, facilitating debate and making decisions, this openness is both necessary and helpful. On the other hand, the fact that the concepts of crime and wrong are not only open, but are also unconfined, is a source both of danger and of difficulty. The danger lies in the risk

(Federation Press, Sydney, 2001) at 39-40; Husak DN, 'Limitations on Criminalization' above footnote 145 at 24; and Gobert J, 'Fortuity of Consequence' (1993) 3 *Criminal Law Forum* 1 at 26.

¹⁴⁹ Ernest Nagel, 'The Enforcement of Morals' [1968] *Humanist* 18 at 27 doubts that there can be any 'wholesale' answer to the question of which categories of conduct are justifiably subject to legal control and suggests that the issue can be resolved only on a case by case basis. Feinberg disagrees and suggests that Nagel's argument shows 'not that there is no *general* answer, but only that there is no *simple* answer.' See Feinberg, *Harm to Others* at 25, emphasis in original.

¹⁵⁰ So, for example Heidi Hurd defines wrongdoing in '*Propter Honoris Respectum: Justification, and Excuse, Wrongdoing and Culpability*' (1999) 74 *Notre Dame Law Review* 1551 at 1558 as 'doing

that communities may choose to act on beliefs based on unwarranted intolerance, bigotry or prejudice when they make their legislative decisions.¹⁵¹ The difficulty is that there is no clear line or test that is contained within our concepts of wrongdoing and crime that neatly divides the conduct that we feel compelled to act against from the conduct that we feel we must tolerate or deal with in other ways. It is because of this difficulty that the responsibility of developing principled controls over the decision-making process at each stage of the criminal justice system is so important.

The need to go beyond the open, normative concepts of crime and wrong when searching for limits on the criminal sanction has led liberal philosophers like Joel Feinberg and John Stuart Mill to champion the concept of harm to others as a control over our legislative decisions. I will discuss the implications of the harm principle, both for the legislative task and for the sentencing task in the next Part, where I will argue that the answer is to be found, not in the extended definitions of harm that have been developed by Feinberg, but in first separating the ordinary meaning of the terms harm, wrong and fault, and then focusing directly on the practical objects of our existing criminal laws and the values that sustain those objects. The task of balancing those values and developing such principled limits over our community responses to the harm done by criminal offenders will occupy the remaining chapters of this thesis, but first it is necessary to summarise the conclusions of the last two chapters and see how we can separate the two normative aspects of a crime from the factual aspect of harm.

an action that violates the maxims of our best moral theory'. See also Hurd HM, 'What in the World is Wrong?' (1994) 5 *Journal of Contemporary Legal Issues* 157.

¹⁵¹ See Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 42.

Chapter Four

Separating Harm, Wrongdoing and Fault

4.1 The difference between the concepts of harm and wrongdoing

I have defined wrongdoing in its everyday sense as conduct or behaviour that deviates from a rule, norm or standard thought to be right, and defined harm as the adverse effect of an event that makes someone or something worse off in some way. Both concepts have a negative connotation, but, when it comes to judging the conduct of others, each concept has a different focus. In the case of harm we look at the effects of the conduct; in the case of wrongdoing we consider the social meaning of the conduct itself and reflect upon the reasons why the rule forbidding it is thought to contribute to a good life for humans who live together in communities.

I have speculated that this aspect of the concept of wrongdoing, and the fact that each rule of conduct has an identifiable factual object, may offer us a way towards developing a principled remoteness test which uses the object or purpose of any given criminal law to set a limit on the kinds of harm that may be taken into account in sentencing. I will expand upon this suggestion in the chapters that follow, where I will argue that, provided each criminal law has an identifiable purpose, and provided each law can be justified by showing how it contributes to assuring the essential conditions under which humans can live a good life together, then we do not need to come to any prior agreement on the 'purposes of punishment' or any theories of ethical value before we can construct a coherent model of the criminal law.

From the point of view of a community, harmful conduct is seen as making the community or its members worse off. However, wrongdoing is conduct which, regardless of its effects, is seen as making a community a worse place simply because of its occurrence and because it has deviated from a rule thought to be right. The distinction between 'worse' and 'worse off' is sometimes a fine one, particularly when the two concepts meet, ie, when conduct is both harmful and wrongful, but the point is that our assessment that an event was harmful does not necessarily convey a negative moral connotation. So, while harmful conduct is always regretted by the community, it is not deplored unless it is also seen as wrongfully done, and this is

because we make allowances for accidentally caused harm, or harm that is judged to be inevitable, or harm that is seen as furthering other valid community purposes. Wrongful conduct, by contrast, is both regretted and deplored by the community. However, the community does not always respond to all instances of harm-doing or even to all instances of wrongdoing by the imposition of legal sanctions, and the reasons why we differ in our responses will be explored in Chapters Ten and Eleven.

The normative notion of wrong exists almost entirely in the realm of value, whereas the concept of harm almost always raises factual or descriptive issues. However, our assessments of both harm and wrongdoing do require selection, evaluation and judgement. Wrongdoing is primarily a normative and qualitative matter, but it also contains a descriptive or factual aspect, which is revealed by the process that we adopt to show that any given conduct is wrongful. First, we must establish the reasons why the rule is thought to be right (the normative issue), and then we must prove that the conduct itself has deviated from the rule (the factual aspect). By contrast, harm itself is a descriptive, factual and quantitative matter that does not require an evaluation of any associated moral dimensions. In order to show that conduct was harmful we simply establish that it has made something or someone worse off. In the case of human beings it seems that we can be made worse off in three different respects, which can be evidenced by negative changes either in our actual states of existence, our legitimate expectations or in our competitive positions. In Chapter Nine I will apply this definition to actual cases and give factual content to the concept of harm by constructing a list of the categories of harm that may be relevant to our decisions at the stages of legislation, conviction and sentencing.

The ordinary meaning of the concept of harm directs us to the process to be followed when we test for the existence of harm, but the open concept of wrongdoing offers no such assistance. This is because wrongfulness is a quality that we attribute to conduct because of the social meaning that we read into it. It is not an intrinsic attribute that we recognise as existing within the conduct itself and for this reason it is commonly said that there is no unfailing 'litmus test'¹⁵² that we can apply to identify cases of wrongdoing. I have suggested that assessing wrongdoing is a matter of

¹⁵² Joel Feinberg pointed out in 'Harm to Others - A Rejoinder' (1986) 5 *Criminal Justice Ethics* 16 at 22 that there is no 'litmus test' in these matters. See also Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 44.

evaluating and recognising our own responses to the conduct rather than recognising a quality within the conduct itself.¹⁵³ Harm, as a factual concept that contains a factual test within its definition, is therefore easier to recognise (and is often a much less controversial matter) than the issue of wrongdoing, and because of this feature it is sometimes seen as offering a way to resolve the difficult normative and moral decisions that we must make when legislating the criminal law. John Stuart Mill's famous 'harm principle' is one that liberal philosophers have suggested may resolve the problems caused by the openness of the concept of wrongdoing, and I will discuss this issue, and its possible implications for our criminal and sentencing law, in greater detail in Chapter Seven.

The answer to the normative inquiry as to whether certain conduct is wrong allows for only one answer, but an inquiry into harm can yield two or more correct, but contradictory, answers. This apparent paradox can be accounted for by the fact that harmful effects can be permanent or temporary and the further fact that a person can be affected for better or for worse by an event in three qualitatively different respects. So, for example, as we saw in section 2.3 of Chapter Two, an event may be characterised as a mixed blessing in cases where it confers both a benefit and a harm; and an apparently harmful event might be characterised as a blessing in disguise when later events reveal that the earlier harm avoided an even greater, threatening, harm. I have suggested that our criminal justice practices should recognise this fact and that we should not adopt a summing approach to 'measuring' harm,¹⁵⁴ nor should we attempt to arrive at a single answer to questions about harm at any of the stages of legislation, conviction or sentencing, and I will discuss these aspects in more detail in Chapter Eleven.

I have suggested that we can contrast the two concepts by pointing to the different ways that we test for their existence and our different responses to the fact of their existence. A conclusion that harm has been caused requires an evaluation of factual

¹⁵³ See Griffin J, *Value Judgment*, (Clarendon Press, Oxford, 1996) at 72 on the difference (and overlap between) recognition and reaction in these matters.

¹⁵⁴ Although I have argued that harm is a quantitative concept, I do not accept that it is therefore susceptible to precise measurement. I have suggested elsewhere that the adjectives of comparison supply an adequate source of 'calibration'; see Davis J, 'The Science of Sentencing: Measurement Theory and von Hirsch's New Scales of Punishment' in Tata C & Hutton N (eds), *Sentencing and Society: International Perspectives*, (Ashgate, Aldershot, 2002) 329 at 349.

effects, whereas a decision that wrongdoing has taken place requires an evaluation not of effect, but of affect – in the sense of an emotional response.¹⁵⁵ This affective or social dimension of wrongdoing is revealed by the emotional base underpinning the concept, which is dominated by the social emotions of shame and guilt, whereas the dominating emotions underlying our responses to harm are the basic emotions of pain, suffering and fear. This social basis of the concept of wrongdoing suggests that the concept relates primarily to the interactions between individuals who live together in groups. By contrast, harm has relevance both at a social or group level and at an individual level as well – not only because we have bodies and individual personalities that can suffer hurt and damage but also because, as self directed individuals, we have wills that can be thwarted.¹⁵⁶ The different emotional foundations underpinning these two concepts – one social, the other basic – account for the fact that the agent of wrongdoing can only be human, but the causes of harm can be much wider. Harm or damage can be caused by historical events, by natural forces or natural processes and by animals as well as by human beings, whereas wrongdoing is an attribute given almost exclusively to human behaviour.¹⁵⁷ Furthermore, it appears that humans can cause harm to others only by deeds (or conduct), and not by thoughts alone, whereas we can wrong others by thoughts as well as deeds.

Many (indeed, most) legal philosophers who have considered the topic of harm have suggested that it is a morally loaded concept with complex normative dimensions, however, the foregoing discussion has shown that these suggestions cannot be sustained – at least when we consider harm in its ordinary, everyday sense. I have attempted to demonstrate that when we analyse harm as a concept and consider harm-causing events themselves, the issues that we must consider are predominantly

¹⁵⁵ This point was first made by Aristotle, who ‘builds both emotional response and intellectual judgement into his account of what it is to act morally’ provided that those emotional responses are appropriate – or virtuous. See Hughes GJ, *Aristotle on Ethics*, (Routledge, London, 2001) at 112-113. For two more recent accounts of the affective dimension, see: Freiberg A, ‘Affective vs Effective Justice: Instrumentalism and Emotionalism in Criminal Justice’ (2001) 5 *Punishment and Society* 265; and Bandes S (ed), *The Passions of Law*, (New York University Press, 1999).

¹⁵⁶ I discuss the two dimensions of welfare and autonomy in Chapter Nine, sections 9.2 and 9.3.

¹⁵⁷ And perhaps to humanly socialised animals. It may sometimes be said of the dog who has bitten the postman that ‘He knew that he had done wrong.’

factual or descriptive issues and have suggested that it is only at the point where we decide to move on and must choose how to respond to those who have caused harm that we enter normative territory. So, while I disagree with those who say that harm is a normative concept, I do acknowledge that once we have decided that a person's conduct has been the cause of harm, and we turn to consider our responses to that person, we cannot avoid considering normative issues. However, once it is our responses that are in issue, we take a different set of evaluative criteria into account and our focus shifts from the effects of the conduct to matters which I suggest are better considered under the normative categories of wrongdoing and fault. The differences between the two concepts are summarised in Table 4.1 below.

In the next Part of this thesis I will consider whether we should abandon the ordinary understanding of the three concepts of harm, wrongdoing and fault, and adopt any of the extended normative definitions of harm that have been developed by those who have theorised about the content and extent of the criminal law. In the Parts that follow I will suggest how we can construct a principled model of the criminal law and the sentencing decision that is based upon what I characterise as the three structural concepts of harm, wrongdoing and fault, and is at the same time also informed by the three elements of the good life that we value most, namely, our welfare, our autonomy and our desire to be respected by others as persons of equal dignity, worth and value, which I will argue can explain and justify most of the decisions (to legislate, to convict and to punish) that we have made within our existing criminal justice system.

TABLE 4.1 SEPARATING WRONGDOING FROM HARM	
WRONGDOING	HARM
DEFINITION AND FOCUS	
<p>Definition: wrongdoing is conduct (either an act or an omission) that deviates from a rule, standard or norm of conduct that is thought to be right.</p> <p>Focus of judgement: is on the social meaning of the conduct itself and the rule or norm of conduct that has been breached.</p>	<p>Definition: harm is the adverse effect of an event that makes something or someone worse off than they were before the event.</p> <p>Focus of judgement: is on the effects of the event.</p>
NATURE OF THE CONCEPT	
<p>Wrongdoing is primarily a normative and qualitative concept, however, it does contain a descriptive or factual aspect.</p> <p>In order to show that conduct is wrongful we must establish:</p> <ol style="list-style-type: none">1. the reasons why the rule is thought to be right [the normative aspect], and2. that the conduct itself has deviated from the rule [the descriptive/factual aspect].	<p>Harm is a descriptive, factual and quantitative concept.</p> <p>In order to show that conduct was harmful we must establish that:</p> <ol style="list-style-type: none">1. it has caused a negative change in something or someone that makes them worse off after the event than they were before the event [a factual aspect].
AGENCY AND MODE OF COMMISSION	
<p>Only humans can do wrong.</p> <p>Humans can wrong others by thought as well as deeds.</p>	<p>Harm can be caused by humans, animals, historical events, natural events or natural processes.</p> <p>Humans can harm others only by external conduct (an act or an omission) and not by thoughts alone.</p>
RELEVANCE AND EMOTIONAL BASIS	
<p>Relevance Wrongdoing is a negative concept with primarily social relevance: it relates more to humans living in groups than to individuals living on their own.</p> <p>Dominating emotions: the social emotions of shame and guilt.</p>	<p>Relevance Harm is a negative concept that has an equal relevance both to individuals living alone as well as to humans living together in a community.</p> <p>Dominating emotions: the basic emotions of pain, suffering and fear.</p>

4.2 Separating Wrongdoing from Fault

As well as contrasting the factual concept of harm with the normative concept of wrongdoing, this Part has also considered the difference between the two closely linked normative concepts of wrongdoing and fault. I have argued that while the concept of wrongdoing in its ordinary sense refers to the fact that someone's conduct has deviated from a rule, norm or standard that is thought to be right, the issue of fault directs us towards a more particularised analysis of the events. When we say that a person is at fault, we mean to convey the idea that their individual responses to their circumstances are not as they should be; that their responses have deviated from those that are thought to be right; and that they have failed to respect, or to be guided by proper values. The normative nature of these two concepts is revealed by the common notion of a 'deviation' from something 'thought to be right' which is contained within both definitions: for conduct to be classified as wrongful it must be shown to have deviated from a rule thought to be right; and for a person to be classified as being at fault, it must be shown that their responses have deviated from those that are thought to be right. Both suggest a failure to meet a normative standard, but each has a different focus; wrongdoing refers to the conduct itself (as externally observed), whereas fault focuses on the attitude or responses of the offender.¹⁵⁸ The normative aspect, which is revealed by the 'thought to be right' element contained in both definitions, also offers us a way to distinguish the nature of these two concepts from the nature of the concept of harm. By contrast with the concepts of fault and wrongdoing, the definition of harm does not contain the normative 'thought to be right' element, rather it contains a factual test that requires us to consider whether the conduct has made anything worse off.

Both wrongdoing and fault are pejorative terms and I have suggested that together they cover all of the normative aspects of a crime that we need to consider when legislating, convicting and sentencing. So, when we come to assess the degree of wrongdoing and the importance of the rule that has been violated we will consider such issues as: the nature and range of the conduct covered by the rule; the relative importance of the protected object or purpose of the rule that forbids the conduct; the community values that underpin that object; and the social meaning of the conduct

¹⁵⁸ So, as I explain below, our definitions of specific crimes sometimes contain elements relating to both of these aspects.

itself, considered in the abstract case. When we turn to consider the aspect of fault, we will consider: the person's state of mind; their intentions and motives; their capacity and degree of control over events; and the values that have guided their choices, considered in the light of their surrounding circumstances and background. I have also suggested in section 2.2 that the concept of fault serves another important function in our decisions, because once we have determined the answer to the purely factual question of the causation of harm, our assessments of fault allow us to attribute criminal responsibility for wrongful conduct which has caused (or threatened to cause) harm, and I will expand upon this use of the concept of fault in Part IV.

One of the analytical difficulties which we encounter in the criminal law is the fact that many crimes specify both conduct and fault elements as part of their definitions. Furthermore, some of those conduct elements also specify the causing of particular harms, and some of those fault elements also specify an intention to cause harms of particular kinds. This means that in the criminal context, any given criminal law that is 'thought to be right' often includes within the one formulation, all of the aspects which I have suggested that we should classify as either harm, wrongdoing or fault. These facts, and the fact that we sometimes make an inference of fault from our reading of a person's conduct, make it easy to understand why some commentators have suggested that the notion of 'culpability is central to the notion of wrongdoing',¹⁵⁹ however, while I agree that the two aspects of fault and wrongdoing are very closely linked, I have also argued that in their ordinary sense, each one has a different conceptual focus. Consequently, while my definition of wrongdoing refers to a 'rule, standard or norm of conduct' that is 'thought to be right', I do not extend it to include a reference to a *criminal law* that is thought to be right, nor do I extend it to include any fault elements that may be contained within those criminal laws. In Chapters Nine, Ten, Eleven and Twelve I will suggest how we might account for the close link between these two deviations, in both conduct and in the individual's responses. In Chapter Twelve I will show how these two concepts, when combined together, can give us a principled test for the remoteness of harm, which uses an objective 'scope of the wrong' test to set the initial limits on the categories of harm that may be relevant to an offender's sentence, and which uses a fault based test to extend those categories when an offender's conduct has expressed a conscious

¹⁵⁹ Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 36-37.

attitude of contempt for the interests of others. The essential differences between these two normative concepts are summarised in Table 4.2 below.

TABLE 4.2 SEPARATING WRONGDOING FROM FAULT	
WRONGDOING	FAULT
DEFINITION AND FOCUS	
<p>Definition: wrongdoing is conduct (either an act or an omission) that deviates from a rule, standard or norm of conduct that is thought to be right.</p> <p>Focus of judgement: is on the social meaning of the conduct itself and the rule or norm of conduct that has been breached.</p>	<p>Definition: a person is at fault if their individual responses to their circumstances are not as they should be, ie, if their responses deviate from those that are thought to be right.</p> <p>Focus of judgement: is on the deficiency in the person's responses and their failure to respect proper values.</p>
NATURE OF THE CONCEPT	
<p>Wrongdoing has primarily a normative and pejorative connotation, however, it does contain a descriptive or factual aspect.</p> <p>In order to show that a person's conduct is wrongful we must establish:</p> <ol style="list-style-type: none">1. the reasons why the rule is thought to be right [the normative aspect], and2. that the conduct itself has deviated from the conduct prescribed by the rule [the descriptive or factual aspect]. <p>Compare: the actual conduct with the conduct specified by the rule.</p>	<p>Fault has a primarily normative and pejorative connotation, however, it also contains a descriptive or factual aspect.</p> <p>In order to show that a person was at fault we must establish:</p> <ol style="list-style-type: none">1. the responses that are thought to be right [the normative aspect], and2. that the person's responses have deviated from the responses thought to be right [the descriptive or factual aspect]. <p>Compare: the person's actual responses with the responses thought to be right.</p>

4.3 Conclusion to Part I

I have suggested that we must work from the things that we can agree upon, in order to find our way around the things that we are doomed to disagree upon. Consequently, the first Part of this thesis has sought to explain the similarities and the differences between harm, wrongdoing and fault and to settle upon definitions of these three concepts that are based upon the ordinary, everyday meaning of the terms.

I have suggested that in its ordinary sense harm should not be viewed as a normative (or moral) concept, and I have defined and classified these three concepts as follows:

Harm (a factual concept):

Harm is the adverse effect of an event that makes something or someone worse off than they were before the event.

Wrongdoing (a normative concept):

Wrongdoing is conduct (either an act or an omission) that deviates from a norm, rule or standard of conduct thought to be right.

Fault (a normative concept):

A person is at fault if their individual responses to their circumstances are not as they should be (ie, if their responses deviate from those that are thought to be right). A person's responses may be manifest in conduct, attitudes or intentions.

My aim in developing these definitions is to illuminate the fact that each one of these concepts has a different focus, and in future chapters I will show how this fact allows us to use each of these concepts in a different way to solve the problems posed by the concept of harm and to give each one a separate role to play in structuring our decisions to legislate, to convict and to punish. I have argued that none of these concepts needs to be defined in terms of the others, and suggested that the only composite concept that should remain is the unavoidably complex concept of crime itself. In Chapters Nine and Ten I will consider how we might fill out our understanding of the concept of a crime and expand its definition by linking the three concepts of wrongdoing, harm and fault, which are so closely associated with the concept of a crime, with the three fundamental 'good life' values which I will suggest are welfare, autonomy and being respected by others as an equal.

I have also suggested that the traditional formulation of the seriousness of a crime, which focuses only on the two elements of harm and culpability, is not enough to guide us in the sentencing task. This formulation risks leaving out a conscious assessment of the social meaning of the conduct itself and the values that have guided us in deciding to criminalise the conduct – two factors which I have suggested should be considered under the separate aspect of wrongdoing. Consequently, I have argued in this chapter that an assessment of each of these three different aspects is necessary when we wish to evaluate the seriousness of any given crime. The normative aspect of wrongdoing points up the importance of the social meaning of the conduct itself considered as a deviation from a norm or standard that is thought to be right. It

requires us to identify the purpose behind the rule and the community values that have led us to protect that purpose by criminalising the conduct that threatens it. The normative element of fault requires us to evaluate the specific, contextual aspects of the individual offender's responses to their circumstances and to consider the reasons why they have failed to respect, or to be guided by, proper values. The factual aspect of harm leads us to consider the impact of the conduct on the world and to assess the extent to which it has made either a person, a thing, a place, or a community worse off.

If we leave any one of these aspects out of the process of assessing the seriousness of a crime, we will lose something important, because as I will argue in the next two Parts of this thesis, these three aspects considered together are the three fundamental factors that account for our decisions to respond to any given conduct by imposing criminal sanctions upon those who commit it. If we ignore any one of them, we will fail to capture all that motivated our action in criminalising the conduct, and we will lose the opportunity to construct a coherent model that allows us to respond in a consistent way to those who offend against the criminal law. I suspect that part of our difficulty in coming to agreement on the range of factors that should be taken into account when we assess the seriousness of a crime has been caused by the fact that we have in the past tended to focus too much either on the 'purposes of punishment' or upon the processes of the substantive criminal law and the distinctions and interpretations of the concepts which we have developed to aid us in deciding whether or not to convict. Sentencers who model their decision upon factors derived from these debates and who focus only on the harm done and the degree of culpability of the offender risk missing out any consideration of the social meaning of the conduct itself and the deeper reasons why we have decided to punish those who have been convicted of committing these crimes.

I want to suggest that we can solve this problem by expanding our focus to include an examination of the role played by each one of these important factors at the legislative stage of the criminal justice process as well as the substantive phase of the trial and conviction. The issue of the social meaning of the conduct does not play a strong or visible role within the actual definitions of crimes or the trial processes of the substantive criminal law, which are designed to help us to decide whether or not the accused should be convicted of the crime. This, and the fact that many of our crimes are defined in terms of intentionally causing a particular kind of harm can

account for the focus on harm and culpability.¹⁶⁰ However, the social meaning of the conduct does become one of the dominant aspects when we consider the two more consciously normative-evaluative stages of the criminal justice process: at the stage of legislation, where we must decide whether the conduct is so serious that we should forbid it on pain of punishment; and at the sentencing stage when we must determine the degree of punishment to impose on the offender. I will return to this issue in Chapter Eleven, where I will attempt to identify the relative importance of the role that each of these concepts plays within our criminal justice processes by identifying the values that have guided some of the key decisions which we have made at the three important stages of legislation, verdict and sentence. I will build upon this analysis in Chapter Twelve to justify a solution to the problem of harm that can ensure that our sentencing decisions will be guided by the same key values that account for the outcomes of the decisions that have been made at the earlier stages of the criminal justice system. In this way I hope to construct a model of the sentencing decision in Chapter Twelve that justifies giving priority to the normative aspects of wrongdoing and fault when we must construct a remoteness rule for sentencing that tells us how much of the harm caused by an offence can fairly be taken into account when sentencing the offender, and which focuses on the factual purpose of each law and the relative importance of its role in securing the conditions under which we can live together with others, when we must evaluate the degree of punishment to impose on offenders who have breached that law.

My approach to the problem of harm and its role in both our criminal law and our sentencing law is based on finding secure grounds upon which we can agree and I have suggested that the ordinary meaning of the three concepts of harm, wrongdoing and fault can provide part of that foundation. In the next Part of this thesis I will turn to the philosophical accounts of harm to see if I can find any reason to abandon these ordinary definitions in favour of adopting any of the extended interpretations that have been developed by philosophers who have linked harm, fault and wrongdoing together in complex, composite definitions in the course of their investigations of the

¹⁶⁰ Andrew Ashworth considers whether the 'harm-plus-culpability' model should be regarded as the natural approach to defining criminal offences in 'Defining Criminal Offences Without Harm' in Smith P (ed), *Essays in Honour of JC Smith*, (Butterworths, London, 1987) 7 at 15. I consider this issue in sections 10.2 and 10.3 of Chapter Ten.

proper limits on the extent of the criminal law. At the same time I will consider whether the elements that these philosophers have built into their definitions can confirm whether we should expand our understanding of the concept of a crime to include the three separate aspects of harm, wrongdoing and fault, so that we can justify considering each of these factors when we must legislate the criminal law, assess the seriousness of crimes and decide upon our punitive responses to those who have committed them. However, the role of this Part of the thesis has been to show that, before we can solve our problems by linking these three concepts together, it is necessary first to understand how we can separate them from each other.

PART II

THE PHILOSOPHICAL ACCOUNTS OF HARM AND *THE MORAL LIMITS OF THE CRIMINAL LAW*

Chapter 5 Definition and the Issue of Limits

- 5.1 The issue of definition
- 5.2 Definition and the issue of limits
- 5.3 The structure of Part II

Chapter 6 The Normative Accounts of Harm

- 6.1 Feinberg's normative definitions of harm
- 6.2 Jerome Hall and the notion of 'social' 'penal' or 'criminal' harm
- 6.3 Jean Hampton on moral injury and moral harm
- 6.4 Harm and the rupture of social bonds of trust
- 6.5 Michael Moore and George Fletcher: wrongdoing and causing harm
- 6.6 Assessing the normative accounts

Chapter 7 The Search for Meaning and *The Moral Limits of the Criminal Law*

- 7.1 Feinberg and Duff: to be wronged is to be harmed
- 7.2 Feinberg and Stewart: separating wrongdoing and harm
- 7.3 Feinberg and Mill: equating harming with wrongdoing
- 7.4 Relating the separate concepts of harm and wrongdoing
- 7.5 Extending the relation: from legislative limits to sentencing limits
- 7.6 Conclusion to Part II: Ending the struggle

Chapter Five

Definition and the Issue of Limits

5.1 The issue of definition

In Part I of this thesis, I analysed the natural meaning of the terms harm and wrongdoing and concluded that the two are readily distinguishable concepts; harm is essentially a factual concept that focuses on the negative effects of an event that make something or someone worse off, whereas wrongdoing is a thoroughly normative concept that derives its social meaning, not necessarily from the effects of someone's conduct, but from the characterisation of the conduct itself as a deviation from a rule, norm or standard thought to be right. Complex normative questions do appear to arise, however, when we go beyond the straightforward factual issue of deciding whether someone's conduct has had a harmful effect and take the further step of assessing the moral quality of conduct that has caused harm to another. As we saw in Part I, although harm itself is a factual concept, the task of judging and responding to the harmful conduct of others leads us on to consider unavoidably normative issues.¹

These normative dimensions expand even further when we must decide not only whether there ought to be a legal response to wrongful conduct that causes harm, but also whether criminal punishment should be a part of that response. So, despite the clear distinctions between harm and wrongdoing, harm is often defined by philosophers in normative terms, in part because of the undeniably normative context in which these wider legal and philosophical inquiries into wrongdoing, crime and

¹ See discussions of the moral issues arising from 'causing harm' in: Raz J, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) at 412-420; and 'Autonomy, Toleration and the Harm Principle' in Gavison R (ed), *Issues in Contemporary Legal Philosophy*, (Clarendon Press, Oxford, 1987) 313 at 326-331; Griffin J, *Value Judgment*, (Clarendon Press, Oxford, 1996) at 73-79; Thomson JJ, *The Realm of Rights*, (Harvard University Press, 1990) at 261; Simester AP, 'Can Negligence be Culpable?' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 85 at 89; Dworkin G, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927 at 944; MacCormick N, *Legal Right and Social Democracy*, (Clarendon Press, Oxford, 1982) at 27-34; and HLA Hart, (Stanford University Press, 1981) at 153.

punishment take place. Joel Feinberg in particular has put forward a highly influential definition of harm that moves far beyond its natural meaning. As we saw in Chapter Two, Feinberg emphasises harm's normative qualities by including the concepts of fault and wrongfulness (which he defines as the indefensible violation of rights) within his complicated six-part definition. One of the aims of this Part is to decide whether we must inevitably follow the lead of these legal philosophers and adopt an extended account of harm that includes the normative concepts of wrongdoing and fault within it or whether it would be preferable (or even possible) to continue to use the natural meaning of the terms and find a way to keep each concept separate from the other when we turn to the three tasks of legislation, conviction and sentencing.

5.2 Definition and the issue of limits

Feinberg's analysis was designed not merely as an academic exercise in definition. Rather, it formed an important part of his lengthy investigation into *The Moral Limits of the Criminal Law*² and John Stuart Mill's proposition that the only morally legitimate reason for the state to interfere in the liberty of citizens is to prevent harm to others (the harm principle).³ This Part will also explore these issues, not only because they offer an opportunity to test the definition of harm that was developed in Chapter Two by comparing it with those put forward by other commentators, but equally importantly, because the reasons that justify the limits on the legislative decision, which is logically and temporally prior to the sentencing decision, may also provide us with a justification for the limits that should be placed on judges when they sentence offenders for their crimes and the harm done by those crimes.

One issue that is often raised in these debates is whether we can recognise a distinctive species of 'penal', 'social', or 'criminal' harm that exists within the broader category of harm and whether it can be identified with any particular interests that are the prime objects of the criminal law's protection. If this special kind of harm does exist, it may not only help us to legislate the criminal law, but it may also help us to solve the problems of deciding upon the relevance of harm to sentencing and finding a rational basis for a remoteness test that will limit the extent to which we

² The four volumes of *The Moral Limits of the Criminal Law* comprise: *Harm to Others*, (Oxford University Press, 1984); *Offense to Others*, (Oxford University Press, 1985); *Harm to Self*, (Oxford University Press, 1986); and *Harmless Wrongdoing*, (Oxford University Press, 1988).

³ Mill JS, *On Liberty and Other Essays*, (Oxford University Press, 1998) at 14.

should track the harmful consequences of a crime. If wrongdoing can justly be criminalised only when it causes this special kind of penal, social or criminal harm, then it would be reasonable to allow only that harm to be relevant to an offender's sentence. The three chapters in this Part seek to resolve this issue by using the everyday meaning of the terms as a source of critique, and this introductory chapter will begin the task of relating this critical analysis of the debates over the moral limits of the criminal law to these questions about harm, wrongdoing and the proper approach to state punishment.

State punishment can be defined as hard treatment thought to be rightly imposed on offenders by the state in response to their legal wrongdoing. By building upon the definition of wrongdoing that was developed in Chapter Three, and adding to it the identification of the relevant source of the opinion that the conduct is wrong and that the rule forbidding it is right,⁴ we can arrive at a more complete definition of legal wrongdoing as 'conduct in breach of a rule thought to be right by the community's recognised law makers'. The two concepts of legal wrongdoing and state punishment, when joined together, give us a complete (though open) account of the normative concept of a crime which can be provisionally defined as:

⁴ See the debate between Antony Duff 'Rule-Violations and Wrongdoings' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 47 and Peter Alldridge 'Making Criminal Law Known' in the same volume at 103, on the way that the criminal law should address citizens. Alldridge, who takes a more pragmatic approach, criticises Duff's account of the criminal law as 'nothing more than a set of universals upon whose basic precepts reasonable people ... may be expected to agree' and argues that a code for citizens should start with 'statements of entitlement upon which citizens can rely' and should tell 'people what they may do' rather than 'what they may not do': at 120, original emphasis. Duff's account of the criminal law as the embodiment of the shared values of a political community (at 53) is itself a response to the way that Paul Robinson and George Fletcher have characterised 'the criminal law as "prohibiting" certain kinds of conduct': see Duff at 49-50 and his references in footnotes 3, 4 and 5. See also Marshall SE & Duff RA, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7. My account seeks a middle ground; the definition I propose emphasises that the source of the opinion that the conduct is wrong and that the rule forbidding it is right is that of the community's recognised law makers, but I would also argue that those views must be based not only on their perceptions of the community's guiding values but also on the overall good of the community they serve and that the laws that result can be criticised on either the basis that they do not properly reflect the views or values of that community or that they will not serve the common good. In the end, however, the debate is a contest over competing values.

- conduct in breach of a rule or norm of conduct thought to be right by a community's recognised law-makers;
- where it is also thought to be right that the state should respond to that conduct by imposing hard treatment on offenders found to be in breach of the law that forbids such conduct.

This definition highlights the important evaluative aspects of the concept of a crime and raises a triple set of normative issues for debate. Before the legislative decision to criminalise conduct can be made, we must first justify:

- why the rule of conduct is thought to be right;
- why hard treatment is thought to be the right legal response to breaches of the law forbidding that conduct; and
- why it is thought to be right that the state should have a role in the process.⁵

Because the concept of crime is an open one and because we do not agree on an underlying ethical theory that can determine in all cases what is right and what is wrong,⁶ legislators have been forced to adopt a case by case approach to answering these three questions and have put forward a range of reasons justifying their decisions. These decisions should be aimed at producing a coherent set of rules that are consistent with previous legislative decisions and the reasons that underpin them.⁷

⁵ I return to consider these issues in much more detail in Chapter Eleven.

⁶ Joel Feinberg pointed out in 'Harm to Others - A Rejoinder' (1986) 5 *Criminal Justice Ethics* 16 at 22 that there is no 'litmus test' in these matters. See also Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 44.

⁷ The debate over the nature of our sentencing practice and the search for coherence and consistency within the sentencing decision making process is discussed in: Tata C, 'Accountability for the Sentencing Decision Process – Towards a New Understanding' in Tata C & Hutton N (eds), *Sentencing and Society: International Perspectives*, (Ashgate, Aldershot, 2002) 398; 'Resolute Ambivalence: Why Juries Do Not Institutionalise Their Decision Support Systems' (2000) 14 *International Review of Law Computers and Technology* 297; and 'The Quest for "Coherence" in the Sentencing Decision Process: Noble Aspiration or Chimera?' paper presented to the *Second International Conference on Sentencing and Society*, at the Centre for Sentencing Research, Law School, Strathclyde University, Glasgow, Scotland, UK, 27-29 June 2002. I return to this issue in section 9.1 of Chapter Nine.

For a more general discussion, see Ronald Dworkin, *Taking Rights Seriously*, (Duckworth, London, 1977) at 248-253, where he suggests that moral arguments must be based on sincere reasons that are consistently followed, are not arbitrarily held, and are not simply based on feelings, prejudice, the views of others, or 'facts' that cannot be rationally supported with evidence. See also

The reasons justifying these choices encompass not only the moral but also the practical, and both kinds of reasons are informed by the legislators' vision of the constituent elements of a good life in a good community and are grounded in the values that lie behind that vision. They will therefore be open to criticism either on the basis that the relative importance of those values has been misread, or on the basis that the decisions when seen in aggregate cannot stand together.

The task of determining the content and structure of the criminal law requires us to choose between competing values, but, because of the nature of values and the nature of the evaluation required by the criminal justice decision making process, the contest is not simply about which is to be the dominant value, but also about the weighting to be given to each one. The need to balance competing values explains why our rules are frequently qualified by exceptions and accounts for the difficulties encountered when lawyers try to appropriate the arguments of philosophers to resolve legal problems. Philosophers debating the content and limits of the criminal law often seek to construct a neat syllogism or a precise, logical argument that trumps all other theories and arguments.⁸ The winning argument is then seen as rendering the others irrelevant by ruling them out altogether on logical grounds. However, a different approach is necessary in the legal environment when we must deal with problems of

Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 42-46, 'Testing Fidelity to Legal Values: Official Involvement and Legal Justice' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 299 at 301; and Husak DN, 'Limitations on Criminalization and the General Part of Criminal Law' in the same volume, 13 at 20. James Griffin defines the virtue of coherence in moral argument as capturing the way 'beliefs can support one another' and in aggregate, can 'pull up the reliability level of the set of beliefs as a whole' in *Value Judgment*, (Clarendon Press, Oxford, 1996) at 9, and 8-18. See also Joel Feinberg's discussion of the methodology of ethical argument in *Harm to Others*, at 16-19; and Antony Duff's discussion in 'Principle and Contradiction in the Criminal Law' in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 156 and the references in his footnotes from 9 to 16.

⁸ See, eg, Russ Shafer-Landau, 'Retributivism and Desert' (2000) 81 *Pacific Philosophical Quarterly* 189, who constructs a logical 'argument from elimination' to attack the retributivist account of punishment. Another example is Mirko Bagaric's utilitarian solution to the sentencing problem *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001). His model is wholly based on an underlying utilitarian account and entails the complete rejection of any other justification. The problem that both of these writers must face is that any failure on their part to convince the reader of their underlying premises sabotages the whole of their argument.

the kind that frequently occur in both the criminal law and in sentencing law and which involve the balancing of values or the weighting of principles. Whereas one value may be held to outweigh another when we are deciding a particular issue, it does not necessarily negate the importance of the other value altogether or push it permanently out of our consideration. So, by contrast with an argument that we have rejected on logical grounds and can safely ignore, a particular value (like human welfare, for example) that we decide must give way in some cases to a counter-value (for example, individual autonomy) will still remain independently valuable and it will continue to be relevant to our subsequent decision-making. The fact that these values remain as independent sources of guidance means that we are often faced with conflicts between them and when this occurs we must find a way to decide which will take priority.

The inevitability of making these kinds of choices⁹ means that, when we turn to the overtly evaluative process of sentencing, a way must be found of linking the relevant aspects of harm, wrongdoing and fault with the values that inform our vision of the good life in a good community so that each can be allocated its proper place within the structure of our decision-making model and so that we can give each one an appropriate weight when we are legislating the criminal law and convicting and sentencing offenders. Consequently, Part II will not only examine the definitions of these concepts that have been developed by philosophers who have debated the moral limits of the criminal law, but it will also consider whether they have ranked the concepts of harm and wrongdoing in order of priority and analyse the ways that they have explained the relationship between them, so that we can take up the task of connecting these fundamental aspects of the criminal law with the values that have informed our understanding of the good life in Part III.

When answering the three questions listed above, legislators must be able to explain how the rule forbidding the conduct will contribute to the overall well-being

⁹ John Alder tracks some of these choices made by judges between incommensurable values in his discussion of 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221. See also Martha Nussbaum's account of the tragic dilemma and the philosophical dispute between Plato and Aristotle on the way to manage conflicts between values in *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, (Cambridge University Press, 1986). I see the institution of state punishment as the result of this kind of choice; it is an unavoidable necessity, rather than a good in itself.

of the community, and, because the normative notion of a crime in both its ordinary and its legal senses contains a primary connotation of wrongdoing,¹⁰ they must also be able to explain why the norm of conduct is either currently thought to be right (in cases where the conduct is viewed by the community as ‘pre-legally wrong’¹¹ or *mala in se*) or why they propose to utilise the authority of the criminal law and its sanctions to create a new norm of conduct, breaches of which will then be viewed as wrongful from that time on (in the case of future wrongs, or those *mala prohibita*). Decisions to impose the criminal sanction should not ignore the aspect of moral wrongfulness¹² or

¹⁰ I argue that the notion of crime contains the connotation of wrongdoing in both its ordinary and legal senses. Crime is defined in the ordinary sense as ‘sinfulness, wickedness, wrongdoing’; ‘an act or omission constituting an offence (usu. a grave one) against an individual or the state and punishable by law’; or ‘an evil or injurious act’ (*SOED*, Volume 1, at 549). Note, however, Glanville Williams, ‘The Definition of Crime’ (1955) 8 *Current Legal Problems* 107 at 110, who distinguishes between the ‘popular meaning’ of crime and the purely technical definition that delimits the use of the word in the legal context. I argue that even the technical definition of a crime does contain the normative concept of a legal wrong within it, and that for this reason, a legislature cannot choose to make any conduct a crime simply by describing it and providing for criminal punishment of that conduct. The account offered by Williams is consistent with this view, because he also includes the notion of ‘a legal wrong’ as well as a consideration of the strength of the condemnation of the conduct in his account; see the discussion in section 3.4 in Chapter Three.

¹¹ I have borrowed this term from Duff, ‘Rule-Violations and Wrongdoings’ above footnote 4 at 60.

¹² I argue in Parts III and IV that the issue of moral wrongfulness should be given a special interpretation within the criminal law, and that we should limit the scope of the criminal law only to the kinds of conduct that we interpret as a wrong *to others*. On the more general point, see Stewart H, ‘Book Review: *Harm and Culpability*’ (1997) 47 *University of Toronto Law Journal* 407 at 412; Husak DN, ‘Limitations on Criminalization and the General Part of Criminal Law’ in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 13 at 20; Moore MS, *Placing Blame*, (Clarendon Press, Oxford, 1997) at 68-79; Ashworth A, ‘Taking the Consequences’ in Shute S, Gardner J & Horder J (eds), *Action and Value in Criminal Law*, (Clarendon Press, Oxford, 1993) 106 at 120, and his quote from Nils Jareborg in *Principles of Criminal Law*, 3rd ed, (Oxford University Press, 1999) at 33, note 41: only for the ‘most reprehensible types of wrongdoing’. See also Von Hirsch A, ‘Proportionate Sentences: A Desert Perspective’ in Ashworth A & von Hirsch A (eds), *Principled Sentencing*, 2nd ed, (Hart Publishing, Oxford, 1998) at 169; Fletcher GP, ‘The Right Deed for the Wrong Reason: A Reply to Mr Robinson’ (1975) 23 *UCLA Law Review* 293 at 298; Marshall SE & Duff RA, ‘Criminalisation and Sharing Wrongs’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 7 at 13.

the ordinary social meaning of the conduct.¹³ If we adopt a purely technical definition that denies the normative nature of crime and allows that any conduct may be counted as a crime, provided only that it has been clearly described and is to be sanctioned by punishment, then we preclude ourselves from utilising one of the most powerful arguments available to us that can justify limiting the content and extent of the criminal law, namely, that the conduct is not seen as being wrong (or in the cases *mala prohibita*, ought not to be viewed as being wrong).¹⁴ We may agree that the criminal law should not necessarily enforce the whole of a community's conventional morality, but it does not follow, either from this agreement or from the fact that we disagree over moral theories, that the decision to impose criminal punishment need not consider the moral or normative aspects of the conduct being debated, and if we disallow the relevance of an argument showing that the conduct under consideration is not and ought not to be seen as wrong, the already frightening reach of the criminal law could expand even further.¹⁵ However, as I have explained in section 3.4 of Chapter Three, the difficulty lies in finding an acceptable justification for our views that any given conduct is wrong, and the search for a theory of criminal wrongdoing has occupied philosophers and legislators for thousands of years.

All three of the issues listed above are canvassed by philosophers in their debates about the proper limits of the criminal law. These debates demonstrate how closely the issue of definition is entwined with the matter of limits because the answers that commentators put forward to resolve the question of limits draw directly upon their understanding of the meaning of the concepts of crime, wrongdoing and punishment, and their views on the proper role of the state. In an important sense, to define *is* to

¹³ Robinson PH & Darley J, *Justice, Liability and Blame: Community Views and the Criminal Law*, (Westview Press, Boulder, 1995). See also references at footnote 130 in Chapter Three.

¹⁴ See footnote 41 in section 1.3 of Chapter One discussing Bernard Harcourt's view that liberals who focus only on the issue of harm have thereby precluded themselves from making purely moral arguments in the debate over the extent of the criminal law.

¹⁵ Andrew Ashworth and Douglas Husak (among many others) discuss the crisis of over-criminalisation and the expansion of the regulatory offences: see Ashworth A, 'Is The Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225 at 227-228 and 244; and *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) Chapters 1-3; Husak DN, 'Limitations on Criminalization and the General Part of Criminal Law' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 13 at 20-21 and references therein. I attempt to deal with this issue in section 11.2 of Chapter Eleven.

limit, and so some writers suggest that the limits are to be found in the special nature of crime itself (as either a special kind of wrongdoing or as wrongdoing that causes a special kind of harm); some find limits in the nature and function of punishment (as a special form of censure, communication, moral education, deterrence or retribution); and others have looked for limits in the nature of the state and its duties (to preserve order and security, to protect the rights of individual citizens, and to provide agreed levels of personal and community welfare).¹⁶

This Part of the thesis will build upon the account of the concepts of wrongdoing, harm and fault developed in Part I and use it as the basis of a critical analysis of the views of the legal philosophers like Joel Feinberg and John Stuart Mill who have contributed so much to the debates over the limits of the criminal law. It will examine not only their use of the concepts of harm and wrongdoing but also consider the ways that they have linked these concepts together in their search for a theory that can define the proper scope of the criminal law and impose acceptable moral limits on it. By adopting this approach I hope to show how the ordinary concepts of harm and wrongdoing fit together into the broader picture of state punishment of crimes, and at the same time to lay a foundation for Part III which will reveal the connections that the criminal law makes between the three fundamental aspects of a crime, which I have identified as harm, wrongdoing and fault, and the three fundamental aspects of a good life in a good community, which in modern western liberal democracies are marked out by the value we place on welfare, on autonomy and on being respected by others as an equal. Taken together, the answers to these questions will show not only that we can develop a coherent and principled approach to sentencing and the criminal law without first having to agree upon a master theory of ethical value that will tell us why we punish, what we punish and how much to punish, but also that it is possible, and indeed preferable, to keep the three concepts of harm, wrongdoing and fault separate when we discuss the problems posed by the criminal law. They will also show why it is essential that we understand the differences between these concepts and their place in the criminal law before we can go further and decide upon the proper place of harm in the model of the criminal law that will be constructed in Part IV.

¹⁶ Husak argues in 'Limitations on Criminalization' above footnote 15 that limits can also be found in the general part of the criminal law, our hostility to strict liability, and the defences to liability.

5.3 The structure of Part II

Part II will focus on the debate over Feinberg's account of harm and its place in the criminal law, not only because it contains the most influential and comprehensive interpretation of the concept of harm and the limits on the criminal law recently given, but also because many of Feinberg's central concerns are essentially the same as those at the heart of this thesis. At both the legislative and the sentencing phases of the criminal justice decision making process there are two linked questions about meaning and limits that must be answered and, if we are to have a coherent criminal justice system, the answers to both questions should be, if not the same, at least congruent. Reference will also be made to the approaches of a number of important contributors to these philosophical debates, however, the sheer volume of material devoted to the moral limits of the criminal law makes it impossible to discuss every contribution, and so only a representative sample of the more important and instructive contributions is contained in this chapter.

The remainder of this Part falls into two chapters: one looking at the ways that the key concepts of harm and wrongdoing have been defined and used in criminal law theory; and the other focusing on the ways that these two concepts have been linked together to limit the extent of the criminal law. Chapter Six, *The Normative Accounts of Harm*, begins with a brief analysis of Feinberg's extended definitions of harm before moving on to discuss: the notion of 'penal' or 'social harm' developed by Jerome Hall; Jean Hampton's account of the moral injury done by crimes; John Kleinig's understanding of harm as the rupturing of bonds of trust; and the contrasting approaches to the problem of harm and wrongdoing given by Michael Moore and George Fletcher. It will conclude by evaluating the usefulness of these extended definitions in the context of sentencing. Although the model of a crime presented in this thesis is built upon the three aspects of harm, wrongdoing and fault, the focus of this chapter is primarily on the key concepts of harm and wrongdoing. This is because there is much less disagreement on the meaning of fault and its relevance to our decisions, and because its role in the criminal law is more straightforward and easy to define by comparison with the roles of harm and wrongdoing, which are not only more controversial but which are often linked together in ways that are liable to confuse. The aspect of fault will, however, be discussed briefly in the analysis of

those philosophical accounts that do include the aspect of fault or culpability within their definitions of harm.

The final Chapter in Part II, *The Search for Meaning and The Moral Limits of the Criminal Law*, widens the investigation and moves from the initial question of meaning to consider the issues of how to structure the decision making process and justify imposing limits on the extent of the criminal law. It contains a critical analysis of Feinberg's approach to the roles played by the concepts of harm and wrongdoing in providing a control on the legislative decision and seeks to build upon the insights gained from this discussion to show how the sentencing decision can also be structured around the same concepts. I begin by examining the views of two of Feinberg's critics, Antony Duff and Hamish Stewart, and move on to contrast these three modern accounts with that offered by John Stuart Mill. The chapter concludes by offering a provisional interpretation of the legislative and sentencing processes that can ensure that the decisions made by both legislators and judges can be informed by a similar understanding of the meaning of the two concepts of harm and wrongdoing, a similar recognition of the nature of the relationship that exists between them within the meaning of the concept of a crime, and a matching account of the justifications for the proper limits on the decisions made by the state's representatives at both stages of the criminal justice system.

This interpretation of our criminal justice practices will be extended and completed in Part IV, which will move away from analysing the meaning of these concepts to consider the relative priority of value that is given to the three aspects of harm, wrongdoing and fault within the practice of the criminal law itself. In Chapters Ten and Eleven I will develop a model of a crime that will be used to examine and explain the three stages of legislation, conviction and sentencing in greater detail. In Chapter Twelve these two strands of argument, the first (which is based on the meaning of the concepts and the relationships between them) and the second (which is based on an evaluation of their role in our criminal justice practices) will be joined together to justify a model of the sentencing decision making process that gives primacy to the normative concepts of wrongdoing and fault over the factual aspect of harm and which proposes a set of sentencing principles that uses these two normative concepts to control our punitive responses to those offenders whose criminal conduct has caused harm.

Chapter Six

The Normative Accounts of Harm

6.1 Feinberg's normative definitions of harm

In his four volume analysis of John Stuart Mill's famous harm principle, Joel Feinberg developed an account of harm that began in the first volume with a simple two part definition of harm as a wrongful setback to interests¹⁷ and ended in the final volume with a complicated six part definition which suggested that A harms B, in 'the sense that is of interest to the law', if and only if:

1. A acts (in a sense wide enough to include omissions and extended sequences of activity)
2. in a manner which is defective or faulty in respect to the risks it creates to B, that is, either with the intention of producing the consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences; and
3. A's acting in that manner is indefensible, that is, neither excusable nor justifiable; and
4. A's action is the cause of an adverse effect on B's self-interest ...which is also
5. a violation of B's right; and
6. B's personal interest is in a worse condition than it would have been in had A not acted as he did.¹⁸

Both the simple and the complex definitions contain normative elements, and certainly the addition of the elements of fault (in clause 2) and wrongdoing, which Feinberg defines as an act that is an indefensible violation of another's right (in clauses 1, 3, and 5), into the final version makes it easy to see why Feinberg claimed in his last volume, *Harmless Wrongdoing*, that harm is an 'ambiguous' and 'treacherous' concept.¹⁹ Feinberg was adamant that the everyday, non-normative meaning of harm must be dismissed if we are to develop an understanding of the term

¹⁷ Feinberg, *Harm to Others* at 36.

¹⁸ Feinberg, *Harmless Wrongdoing* at 26. An earlier five part definition, which is similar to the final definition, appears in *Harm to Others* at 105-106. See also 'Wrongful Life and the Counterfactual Element in Harming' (1986) 4 *Social Philosophy and Policy* 145 at 148 and my discussion of the counterfactual aspects (item 6) of Feinberg's definition in sections 2.2 and 2.3 of Chapter Two.

¹⁹ Feinberg, *Harmless Wrongdoing* at xxvii.

that is to be of use to the law,²⁰ and he argued that Mill's harm principle would be 'quite implausible' if the word was used in its ordinary 'broad' sense.²¹ In this respect, he agreed with John Kleinig who had pointed out in 1978 that there is 'not much mileage to be gained by explicating harm in terms of loss, damage or injury'.²²

These two philosophers are not alone in maintaining that harm must be interpreted in this special normative way. In fact many commentators who have considered the issue link harm with one or both of the normative concepts of culpability or wrongdoing and arrive at an extended normative definition of harm,²³ whereas many others who follow the trend simply state that harm itself is a normative concept without explaining why this is so.²⁴ The aim of this chapter is to explore the reasons behind this course of action and I will demonstrate why this trend, which is productive of such confusion, should be resisted. I suggest that most commentators who state that harm is a normative concept have slipped from analysing harm itself to concentrate instead on the issue of judging either the moral quality of harmful conduct or the attitudes and intentions of those who commit it, and indeed, when we look at Feinberg's two definitions given above we can see how he has moved from defining harm as an effect in the first version to defining the circumstances under which an act of harming is properly thought to be wrong in the final version. This shift is obscured to some degree because it is facilitated by the fact that the word harm can be used either as a noun or as a verb.²⁵ However, the shift is a significant one because once our focus is no longer on characterising the effect of the conduct, but on characterising its meaning (see Feinberg's clause 5: harm as a violation) or judging its moral quality (clause 3: harm as produced by indefensible, inexcusable or unjustified

²⁰ Feinberg, *Harm to Others* at 32 and 36; *Harmless Wrongdoing* at xxix.

²¹ Feinberg 'Wrongful Life' above footnote 18 at 146; *Harmless Wrongdoing* at xxix.

²² Kleinig J, 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27 at 28; Feinberg, *Harm to Others* at 32 and 36.

²³ Many of these accounts were introduced section 1.1 of Chapter One. Others will be discussed below.

²⁴ Or, if they do attempt to explain why harm is a normative term, they provide evidence that is directly related to the wrongfulness of the conduct that causes it, see, eg, Dworkin G, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927 at 930.

²⁵ See section 2.1 in Chapter Two.

conduct), we have entered normative territory and our analysis is more properly concerned with wrongdoing and fault and not with harm at all.

These extended normative definitions of harm which stray too far from the ordinary meaning of the concept can sabotage our debates over these important community issues of crime and punishment, and philosophers who use these special definitions in their arguments risk dooming themselves to irrelevancy in our courts and legislatures. Even worse, as I demonstrate in section 7.2 of Chapter Seven, this approach risks clouding our thinking to such an extent that we can be led to deny fundamental truths about punishment and the limits of the criminal law. Consequently, I will argue in this chapter that Feinberg's clauses numbered 1, 2, 3, and 5, which capture the essentially normative aspects of wrongdoing and fault, should be excised from any definition of harm that is designed to be used for sentencing purposes. So, unlike Feinberg and Kleinig, who argue that there is no mileage to be gained by adopting the 'broad' everyday sense of harm, I will argue that the only mileage to be gained from the concept of harm is to stick with the ordinary sense of the word as the adverse effect of an offender's criminal conduct that has made someone or something worse off.

Feinberg warns the reader in the first chapter of *Harm to Others* that it is 'no part' of his purpose 'to provide an accurate dictionary definition of a word that is simply a useful peg' upon which to build an analysis of John Stuart Mill's liberty based harm principle.²⁶ He then proceeds to develop, from the usual meanings of the word, an account of the concept of harm that best suits his purposes. As we have seen in Chapter Two, Feinberg expands and changes his account in order to assist in his wide-ranging discussion of the moral limits of the criminal law, but I will argue that this extended definition does not offer any kind of 'useful peg' upon which to base a definition of harm for sentencing purposes. This is because the final six part version that Feinberg chooses as the most useful for his purposes is crowded with so many other important aspects of a crime that it is quite unsuited for any other analytical purpose or any other context. The proliferation of these 'special senses' of harm did, in fact, give Feinberg cause for concern,²⁷ and at some points the meanings that he

²⁶ Feinberg, *Harm to Others* at 32.

²⁷ In the introduction to *Harmless Wrongdoing* Feinberg himself wondered whether there had been 'too great a proliferation of senses' at xxviii.

adopted were so far removed from the natural meaning that he was forced to use special indicating marks to distinguish them:

Excused or justified wrongdoing is not wrongdoing at all, and without wrongdoing, there is no “harming” however severe the harm that might have resulted.²⁸

‘[A] harm₁ is a state of adversely affected interest....’²⁹ ‘I have also used the word “harm” in a special technical sense This second sense of “harming” to which we can attach the subscript₂, is the overlap of harming₁ and wronging (one particular way of acting wrongly). A harms₂ B in this second sense when he both harms₁ him and in so doing also wrongs him. Thus harming₂ includes all harming₁ that is also wronging and all wronging that is also harming₁.³⁰

The problems caused by the use of such extended definitions are clearly demonstrated by these examples; once the usual meaning is abandoned, the reader can no longer be sure what the terms are meant to convey. At times the sentences that contain these special terms seem to be self-contradictory, as for example, when Feinberg is forced by his definition to say that those who harm themselves have not “harmed” themselves, or that those who have consented to the infliction of harm have not been “harmed”.³¹ If we consider the natural meaning of the terms, then we have to understand Feinberg as suggesting in both cases that the sufferers, though worse off than they were before the events, have not in fact been wronged by the harmful conduct of others, or have not done wrong when they harmed themselves. In these cases the ordinary word harm becomes a code for harm-and-wrong or even harm-and-wrong-and-fault and only the context or the special indicating marks tell us what is meant. But by burying the separate normative concept of wrong inside the factual concept of harm to solve one problem, Feinberg has created another. Once the stronger normative sense of wrongdoing is added to the factual concept of harm, it overpowers it to such an extent that harm’s usefulness and function as *a factual term* is lost. However, because this ordinary factual sense of harm is so valuable, Feinberg is forced to use his special indicating marks so that he can continue to make use of it

²⁸ Feinberg, *Harm to Others* at 109.

²⁹ Feinberg, *Harmless Wrongdoing* at xxvii-xxviii.

³⁰ Feinberg, *Harmless Wrongdoing* at xxviii-xxix.

³¹ Feinberg, *Harm to Others* at 35-36 and 115-117.

in his arguments.³² In a frustrating twist, Feinberg's definitional tactic, which was logically designed to help mark out harm's function in limiting the extent of the criminal law, almost destroys harm's original sense and the new sense of harm becomes useless for any other purpose. Ironically, this is nowhere more apparent than in Feinberg's own discussion of the criminal law, where it is often necessary to make a distinction between the fact that harm has been caused and the issue of judging whether that conduct is wrongful and should attract criminal sanctions.

6.2 Jerome Hall and the notion of 'social', 'penal' or 'criminal' harm

Similar examples which risk confusing the reader can be found in the work of other leading commentators, where on occasion the wording can appear to be not only illogical but positively misleading. In these cases only a knowledge of the writer's special meanings and a close examination of the context can make sense of the way in which the terms are used. Jerome Hall, for example, argued in 1947 that 'a death caused by reckless driving is a less serious harm than a death caused by a deliberate murderer.'³³ In the light of the natural meaning of the terms, it is clear that Hall was not referring to the difference between the immediate results of the two cases, but to the difference between the overall moral seriousness or social meaning of the conduct and the way that the culpability of the offenders affects our assessment of their conduct. However, Hall's own normative definition of this 'penal' or 'social' harm,

³² By contrast, Mirko Bagaric, who has also argued in *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001) at 190, that 'harm includes culpability', appears to be motivated by the usefulness of the normative aspect of fault. By defining harm in this way he can make the utilitarian claim that 'offence seriousness is solely a variable of the amount of harm caused by the offence' (at 190) but saves himself from taking the controversial step of excluding the aspect of fault from his calculations of punishment. Even utilitarians, it seems, need not be 'short-sighted' (at 187). Bagaric's definition is a mirage and need not trouble us. At no point does he use harm in a sense that includes culpability and so his assertion can be read as suggesting simply that punishment should be proportioned to the aspects of harm and culpability.

³³ *General Principles of Criminal Law*, 2nd ed, (Bobbs-Merrill, Indianapolis, 1960) at 215. Antony Duff makes a similar contrast in 'Harms and Wrongs' (2001) 5 *Buffalo Criminal Law Review* 13 at 21, between harm caused by a natural disaster and harm caused intentionally during a burglary, as does Jean Hampton in 'Correcting Harms Versus Righting Wrongs' (1992) 39 *University of California at Los Angeles Law Review* 1659 at 1677-1678.

‘the essential determination of which is the moral culpability of the actor,’³⁴ led him to structure this rather confusing sentence around the concept of harm instead of the normative aspects of the crimes. Somewhat misleadingly, Hall traced the insistence that there is an identifiably ‘penal’ or ‘social’ or distinctively ‘criminal’ harm that affects all within a community back to Blackstone’s discussion of the difference between crime and tort,³⁵ and he emphasised, somewhat inscrutably, that this special harm ‘must be stated in terms of intangibles’ and ‘signifies the loss of a value’ the ‘locus’ of which ‘is not simply in the thing itself’ but which is instead a ‘complex of fact, valuation and interpersonal relations – not an observable thing or effect’.³⁶

Richard Burgh also focuses on the special social harm caused by a criminal offence that goes beyond the mere effects of the conduct, and he defines the ‘complex notion’ of this additional social harm as ‘the invasion of the interest society has in not having its constitutive values repudiated.’³⁷ Burgh argues that an intentional violation (or repudiation of value) causes more ‘social harm’ than similar violations committed by an impaired actor and, because he views punishment as ‘compensation for social harm’, he argues that the diminished actor therefore deserves less punishment.³⁸ Not surprisingly, in the light of the fact that Burgh proposes a corrective theory of criminal punishment, the link which he makes between culpability, values, and social harm is similar in many respects to the view of harm which is taken by those like Daniel Van Ness and Lode Walgrave who argue for a restorative approach to criminal justice and who have also identified the harm caused by crime as extending to include damage to fundamental community or social values.³⁹

³⁴ Hall, *General Principles*, above footnote 33 at 242.

³⁵ Hall, *General Principles*, above footnote 33 at 241, citing Blackstone’s *Commentaries on the Laws of England, Volume IV, Of Public Wrongs*, (University of Chicago Press, 1979) first published 1769, at 5. Blackstone does distinguish between torts and crimes on the basis that the harm done is different, but there is no evidence that he links this difference to the aspect of moral culpability, as Hall does. Blackstone uses harm in its more ordinary sense and identifies the different ways that conduct which is both a crime and a tort can make individuals and the community worse off.

³⁶ Hall, *General Principles*, above footnote 33 at 215.

³⁷ Burgh RW, ‘Guilt, Punishment and Desert’ in Schoeman F (ed), *Responsibility, Character and the Emotions*, (Cambridge University Press, 1987) 316 at 331 and 334.

³⁸ Burgh, ‘Guilt, Punishment and Desert’ above footnote 37 at 334, see also 324-325.

³⁹ Van Ness DW, ‘Restorative Justice’ in Galaway B & Hudson J (eds), *Criminal Justice, Restitution and Reconciliation*, (Willow Tree Press, New York, 1990) 7 at 9: ‘damage to community values’;

This emphasis on value can also be found in Lawrence Becker's theory of crime, which, like Hall's and Burgh's accounts, relies on a unifying concept of social harm, but which is focused on the 'social volatility', which is 'a disvalue in itself', that is created by acts that have been 'produced by an individual's socially unstable character traits'.⁴⁰ Becker is explicit: this distinctive 'social' or 'criminal' harm refers not to the 'the victims' injuries', but to the social volatility that is a consequence of 'the ways in which those harms come about'⁴¹ and the malicious, reckless or indifferent disregard displayed by the offenders.⁴² Likewise, Gerard Bradley's suggestion, that any '*lawbreaking*, as such, harms the common good and disadvantages every member of society by devaluing a habit or attitude conducive to everyone's wellbeing',⁴³ also emphasises the issue of values. However, while the common characterisation that runs through all of these accounts of 'social harm' as an attack on values, as damage to or the loss of values, or even as an actual disvalue in itself, certainly serves to remind us of the important role played by a community's fundamental values in shaping its criminal law, these accounts (except to the extent that they are based partly on the actual fear caused by the commission of a crime within the community)⁴⁴ do not appear to be focused on harm at all, particularly if we consider both the nature of values and the meaning of harm in its ordinary sense.

and Ashworth's reference in 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Crawford A & Goodey J (eds), *Integrating a Victim Perspective within Criminal Justice*, (Ashgate, Aldershot, 2000) 185 at 193 quoting Walgrave: harm to 'fundamental values of society'. See also Braithwaite J, *Crime, Shame and Reintegration*, (Cambridge University Press, 1989).

⁴⁰ Becker L, 'Criminal Attempt and the Theory of Crimes' (1974) 3 *Philosophy and Public Affairs* 262 at 274.

⁴¹ Becker, 'Criminal Attempt and the Theory of Crimes' above footnote 40 at 292.

⁴² Becker, 'Criminal Attempt and the Theory of Crimes' above footnote 40 at 292-293 and 270-271.

⁴³ Bradley GV, 'Retribution and the Secondary Aims of Punishment' (1999) 44 *American Journal of Jurisprudence* 105 at 108, original emphasis. The focus of this social damage is the 'great public good of law-abidingness.'

⁴⁴ Becker's case appears to be partly based on the actual fear caused by the commission of a crime, and in this respect it is similar to Robert Nozick's account of the difference between crime and tort in *Anarchy, State and Utopia*, (Basil Blackwell, Oxford, 1974) which refers to the characteristic fear that is aroused by crimes, but not torts. See the discussion between Feinberg and Kleinig on this point in: Kleinig J, 'Criminally Harming Others' (1986) 5 *Criminal Justice Ethics* 3 at 7-8; and Feinberg J, 'Harm to Others - A Rejoinder' (1986) 5 *Criminal Justice Ethics* 16 at 18-20.

Rather, they appear to be focused either on the culpable character traits or states of mind of the offenders (which can be considered under the category of fault), or upon the social meaning of the conduct itself, as a deviation from or violation of a rule thought to be right (which can be considered under the category of wrongdoing).

A value, understood as a standard or principle held by a person or a community to be an important aspect of their conception of the good life, cannot itself be harmed by the conduct of any person.⁴⁵ Of course, the specific individual or community interests that the law protects (and which have been justified by those community values) can be set back or damaged, but the value itself and the importance with which it is viewed by the community remains unaffected.⁴⁶ We often characterise criminal conduct as an attack upon, a violation of, or an invasion of particular community or personal interests and interpret an offender's conduct as a repudiation of, or an expression of contempt or disrespect for, the worth of the victim or for the community and its rules, norms and values, but these expressions do not convey the suggestion of harm or damage, rather they reveal our interpretation of and our responses to the social meaning of that conduct and the attitudes of those who commit it. As Feinberg pointed out when he added wrongfulness into his own definition of harm precisely in order to emphasise the normative aspects of the criminal law, the 'word "violate" suggests the element of wrongfulness but does not add anything to our understanding of the nature of the effect on interests.'⁴⁷ The same point could be made in relation to the terms 'attack', 'invasion' and 'repudiation' and so, despite the fact these writers all identify their accounts as describing a special normative kind of harm and use the language of harm in constructing their accounts, I suggest that their accounts are better interpreted as highlighting the importance of the normative issues of wrongdoing and fault in the criminal law.

⁴⁵ This is similar to the point made by Feinberg in *Harm to Others* at 4 where he argues that it is not possible 'to break or damage the number seven or the law of gravity.' For an analysis of the nature of value see: Baier K, 'What is Value?' in Baier K & Rescher N (eds), *Values and The Future*, (Macmillan, New York, 1971) 33; Handy R, *The Measurement of Values*, (Warren T Green, St Louis, 1970); and Griffin J, *Value Judgment*, (Clarendon Press, Oxford, 1996).

⁴⁶ Community attitudes towards the relative importance of specific values can change over time, but I would argue that the mere fact of change is not evidence of a harmful change that necessarily renders the community worse off.

⁴⁷ Feinberg, *Harm to Others* at 52.

A further reason for refusing to adopt any of these extended definitions is the fact that the notions of social or criminal harm can play a more useful role when understood in their ordinary factual sense. Paul Robinson, for example, also uses the term societal or social harm but while his definition correctly allows that harm has both tangible and intangible aspects, it does not include any of the normative aspects of fault or wrongdoing within it. Robinson's definition refers to 'physical and intangible harm, damage, injury, detriment, and loss of any kind to individuals or society to tangible or intangible interests, directly or indirectly'⁴⁸ and by adopting this definition he is able to make a useful contrast between the wider harm caused to the community and the specific harm caused to the immediate victim of a crime. Criminal harm has been defined by Albin Eser as 'the actual or potential prejudice to socially and constitutionally recognized and criminally sanctioned factual interests' which can be those of an 'individual, group or state'.⁴⁹ He emphasises the factual nature of harm and, like Neil MacCormick, points out that the decision to recognise these factual interests is in turn based on the 'intangibility of generally conceived universal values' and 'the normative, selective function of the law'.⁵⁰ Eser's explanation of criminal harm and Robinson's understanding of social harm are to be preferred to the extended versions put forward by Jerome Hall⁵¹ and the other commentators discussed in this section, not only because they remain faithful to the ordinary meanings of these terms, but also because they point up more clearly the relationship between harm, conceived of as a factual setback to the interests of either a community or an individual, and the underlying values that determine which of those factual interests are worthy of the

⁴⁸ 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *University of California at Los Angeles Law Review* 266 at 267; 'Rules of Conduct and Principles of Adjudication' (1990) 57 *University of Chicago Law Review* 729 at 749. For an example of the way that Robinson uses this definition, see Robinson PH & Darley J, 'Testing Competing Theories of Justification' (1998) 76 *North Carolina Law Review* 453. I discuss the shortcomings of Robinson's approach to calculating a final amount of net harm in section 2.2 of Chapter Two.

⁴⁹ Eser A, 'The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests' (1965) 4 *Duquesne University Law Review* 345 at 413.

⁵⁰ Eser, 'A Comparative Analysis' above footnote 49 at 412. See MacCormick N, *Legal Right and Social Democracy*, (Clarendon Press, Oxford, 1982) at 30: 'the harm principle would be vacuous' unless it is viewed as protecting a conception of 'legitimate interests according to a certain dominant political morality'.

⁵¹ Eser discusses Hall's account in 'A Comparative Analysis' above footnote 49 at 370-374.

law's protection. This relationship will be explored in more detail in Chapter Nine when I move on from the problem of defining harm and put the definition to work in order to solve the next challenge which is to identify and evaluate the actual instances of harm that are caused by conduct that is commonly sanctioned by the criminal law.

6.3 Jean Hampton on moral injury and moral harm

Philosophers who have argued for the existence of a distinctive 'social harm' caused by crime often do so because of their commitment to a justification for punishment that is based on a theory of corrective justice,⁵² and those who characterise crimes as a violation of or a repudiation of community values often do so in the context of the recent movement to analyse criminal punishment in terms of its expressive, educative and communicative functions.⁵³ Jean Hampton has recently put forward a pluralist theory of punishment which attempts to justify the inclusion of a corrective component within a retributive framework and which links the expressive meaning of an offender's conduct with an account of the special moral injury or damage which that conduct causes.⁵⁴ Hampton, like the other philosophers discussed in the previous section, uses the language and imagery of harm to describe this distinctive moral injury that characterises conduct which is rightfully made criminal, but unlike the others, she attempts to distinguish the ordinary harm that is caused by a crime from the special moral injury or damage that is 'effected by the wrongdoing'

⁵² See, for example, Richard Burgh's account discussed in the previous section.

⁵³ Feinberg's essay 'The Expressive Function of Punishment' in *Doing and Deserving: Essays in the Theory of Responsibility*, (Princeton University Press, 1970) 95 was at the forefront of the 'expressivist' movement, a fact noted by Bernard Harcourt in 'Joel Feinberg on Crime and Punishment: Exploring the Relationship Between *The Moral Limits on the Criminal Law* and *The Expressive Function of Punishment*' (2001) 5 *Buffalo Criminal Law Review* 145. Antony Duff has championed the communicative approach, most recently in *Punishment, Communication and Community*, (Oxford University Press, 2001). I discuss Duff's approach in section 7.1 of Chapter Seven. For critical discussions of the 'expressivist turn', see Davis M, 'Punishment as Language: Misleading Analogy for Desert Theorists' (1991) 10 *Law and Philosophy* 311; and Adler MD, 'Expressive Theories of Law: A Skeptical Overview' (2000) 148 *University of Pennsylvania Law Review* 1363 at 1414-1428.

⁵⁴ Hampton outlined the moral education theory in Murphy JG & Hampton J, *Mercy and Forgiveness*, (Cambridge University Press, 1988) and developed her pluralist account in 'Correcting Harms Versus Righting Wrongs' above footnote 33.

and which she describes as the ‘diminishment’ or ‘damage to the realisation of a victim’s value’.⁵⁵ At the same time she argues that ‘retribution is actually a form of compensation to the victim’ and suggests that corrective justice ‘compensates victims for harms, whereas retributive justice compensates victims for moral injuries.’⁵⁶

Hampton’s ingenious argument exploits the double meaning of the word injury, which in its ordinary usage (and by contrast with the concept of harm) contains two equally balanced senses: the normative and the factual. In the first sense injury contains a connotation of moral wrongdoing, an offence, an affront, an unfair attack, or some form of unjust treatment that invades or violates another’s rights, whereas in its other sense, injury simply suggests the fact of damage, hurt or loss, as for example when a footballer suffers a knee injury or when a shoe is marketed as lessening the risk of injury.⁵⁷ In the legal context the normative usage tends to dominate as the Latin word *injuria* is used to refer to an actionable wrong or invasion of another’s legal rights,⁵⁸ however, while the word injurious in its ordinary non-technical sense is a useful way of referring to conduct that is both harmful and wrongful, the use of the term can lead to confusion when used in legal or philosophical arguments.⁵⁹ Despite Hampton’s attempts to describe this special moral injury in terms of harm or damage, I suggest that her real concern is not with the way that the victim has been made worse off or harmed, but with the normative sense of the term injury, or the way that the conduct is read⁶⁰ as an offence or an affront. This is confirmed by her view that:

When we behave “wrongfully” we fail to conform to what our society would recognise as acceptable behaviour, either by doing things that are

⁵⁵ Hampton defines the ordinary meaning of harm as ‘a disruption of or interference in a person’s well-being’ in ‘Correcting Harms’ above footnote 49 at 1662 and describes the moral injury or damage at 1678-1679. I discuss her account of harm again in section 9.4 of Chapter Nine.

⁵⁶ Hampton, ‘Correcting Harms’ above footnote 49 at 1698.

⁵⁷ *SOED* at 1371. This entry contains the second of the cited illustrations. See also Kleinig J, ‘Crime and the Concept of Harm’ (1978) 15 *American Philosophical Quarterly* 27 at 34.

⁵⁸ The concept of injury also caused Feinberg difficulty; see his rewording of the *Restatement of the Law of Torts*, where he substitutes injury for harm and harm for injury in *Harm to Others*, at 106.

⁵⁹ So, for example, in Ashworth A & von Hirsch A, ‘Recognising Elephants: The Problem of the Custody Threshold’ [1997] *Criminal Law Review* 187 at 188, when the authors suggest that the seriousness of a crime ‘has something to do with the conduct’s degree of injuriousness’ it is not clear whether the term includes the aspect of moral wrongfulness or is simply a synonym for harm.

⁶⁰ Hampton, ‘Correcting Harms’ above footnote 49 at 1684.

conventionally understood to be wrong, or by inventing from conventional behavioural material novel ways of expressing our defiance of what society understands as respectful behaviour.⁶¹

Hampton argues that we respond with a 'special kind of anger'⁶² to this message of defiance and disrespect that is characteristically contained in criminal behaviour 'whose meaning, appropriately understood by members of the cultural community' falsely represents the victim's value 'to be less than the value [they] should be accorded'⁶³ and which 'constitutes a treatment of the victim that violates the entitlements which that person's value requires other human beings to respect.'⁶⁴ I will defer until Chapter Nine any discussion of whether disrespectful conduct can be seen as harming another person,⁶⁵ however, I want to suggest here that Hampton's focus on the attitudes of the offender and the social meaning of criminal conduct shows that her 'moral injury' is in essence no different from the 'social', 'penal' or 'criminal' harm discussed by Hall, Burgh and Becker. All of these approaches confirm that even when we try to identify the distinctive marks of a crime in terms of the factual concept of harm we are inevitably drawn back to emphasise the importance of the roles played by fault and wrongdoing and, instead of proving that harm is a normative concept, they remind us that, in the criminal law, the normative almost always dominates our responses to, and our interpretations of, the factual.

6.4 Harm and the rupture of social bonds of trust

Another interpretation of the distinguishing harm caused by a crime has been put forward by John Kleinig. He argues that crimes commonly cause a special harm to society which is to be understood as 'the erosion of ... relationships of trust' and which 'threatens the social relations on which our well-being depends.'⁶⁶ While this

⁶¹ Hampton, 'Correcting Harms' above footnote 49 at 1670.

⁶² Hampton, 'Correcting Harms' above footnote 49 at 1678.

⁶³ Hampton, 'Correcting Harms' above footnote 49 at 1670.

⁶⁴ Hampton, 'Correcting Harms' above footnote 49 at 1678.

⁶⁵ I agree with Hampton that treating someone with disrespect may well be the hallmark of wrongdoing, but I argue in section 9.4 of Chapter Nine, that conduct which we classify as disrespectful, does not of itself and for that reason alone, harm them.

⁶⁶ Kleinig J, 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27 at 35 and 'Criminally Harming Others' (1986) 5 *Criminal Justice Ethics* 3 at 9.

harm is partly to be found in the fact that it forces us to divert our resources into self-protective measures it is also based on the fact that it 'is associated only with conduct in which a morally condemnable character failing is manifested.'⁶⁷ Similar accounts of wrongdoing which utilise the imagery of the weakening, rending or warping of the social 'fabric that is integral to our personhood'⁶⁸ and the erosion or rupture of social bonds or the breaking of 'the "web" of human relationships' within a community the can be found in the work of Linda Meyer⁶⁹ and in the theories of those whose allegiance to restorative justice leads them to characterise the proper aim of the criminal justice system as repairing these 'ruptured social bonds', 'healing the wounds' caused by crime, and allowing offenders to make both actual and symbolic reparation to victims and society for this damage done to both social and moral relationships.⁷⁰

⁶⁷ Kleinig, 'Criminally Harming Others' above footnote 66 at 8-9: these harms that have been 'wilfully or recklessly caused reflect ... a significantly antisocial character'.

⁶⁸ Kleinig, 'Crime and the Concept of Harm' above footnote 66 at 36. A recent Lexis search yielding over 1200 results revealed the extent to which legal scholars use the imagery of tearing, shattering, eroding, warping, weakening, fraying, unravelling, injuring, destroying, corroding, even wounding the 'social fabric'.

⁶⁹ Meyer LR, 'Forgiveness and Public Trust' (2000) 27 *Fordham Urban Law Journal* 1515 at 1517-1518, citing Hannah Arendt.

⁷⁰ Daniel Van Ness commonly describes crime and the aims of restorative justice in these terms, see *Crime and Its Victims*, (Intervarsity Press, Illinois, 1986); 'Restorative Justice' in Galaway B & Hudson J (eds), *Criminal Justice, Restitution and Reconciliation*, (Willow Tree Press, New York, 1990) 7 and 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Criminal Law Forum* 251. See also Retzinger S & Scheff T, 'Strategy for Community Conferences: Emotions and Social Bonds' in Galaway B & Hudson J (eds), *Restorative Justice: International Perspectives*, (Criminal Justice Press, New York, 1996) 315 at 316-317; and Davis G, *Making Amends: Mediation and Reparation in Criminal Justice*, (Routledge, London, 1992) at 205. Not all of the proponents of restorative justice like these metaphors: see Lode Walgrave who disapproves of the healing metaphor in 'Extending the Victim Perspective Towards a Systemic Restorative Justice Alternative' in Crawford A & Goodey J (eds), *Integrating a Victim Perspective within Criminal Justice*, (Ashgate, Aldershot, 2000) 253 at 281 at footnote 5. Antony Duff, while not advocating a restorative justice approach, also suggests in 'Restoration and Retribution' in von Hirsch et al (eds), *Restorative Justice and Criminal Justice*, (Hart, Oxford, 2003) 43 at 47, that when we wrong a fellow citizen our action 'damages the normative bonds of citizenship' and suggests in *Punishment, Communication and Community*, (Oxford University Press, 2001) at 151 that crimes 'destroy the bonds of community' which bonds we preserve by punishing offenders.

This imagery suggesting that there is a special moral harm done by crime to the 'social fabric' or to 'social bonds' of trust is often nothing more than imagery, and in fact we could just as easily argue that the symbolism in many crimes, like rape, for example, lies not in the breach of social bonds, but in the imposition of a new, unwanted and offensive bond between victim and offender.⁷¹ To the extent that a crime actually causes some perception of fear or the loss of particular social relationships we can agree with Kleinig and Feinberg that it has been harmful,⁷² but insofar as this erosion or rupture is evidenced by the morally blameworthy intentions or attitudes of the actor or the moral quality of their conduct it is more properly concerned with the aspects of wrongdoing or culpability, as Feinberg and Kathleen Daly have pointed out.⁷³

6.5 Michael Moore and George Fletcher: wrongdoing and causing harm

The slip between the factual concept of harm and the normative concept of wrong is often made when commentators, who have adopted their own special understanding of these fundamental terms, wish to refer to the work of others who happen to use the words in their everyday sense. Michael Moore, when attacking the 'standard educated view' of the punishment of attempts, cites HLA Hart as having made the point that the grading of punishment according to 'the amount of *wrong* done' had been attacked as illogical.⁷⁴ In fact, Hart had written about the grading of punishments according to 'the amount of *harm* actually done'⁷⁵ but Moore chose to re-word Hart's

⁷¹ David Owen points out that the purpose of the law is 'to protect and enforce distinctions between persons' in 'Philosophical Foundations of Fault in Tort Law' in Owen D (ed), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995) 201 at 221, and suggests that law or justice must undo the illicit link formed by crime. See also Girard R, *Violence and the Sacred*, (The Johns Hopkins University Press, London, 1977) at 51.

⁷² Feinberg, 'Harm to Others - A Rejoinder' above footnote 44 at 16 discusses Kleinig's approach at 20-22 and argues that it is not a distinctive 'new generic category' of harm.

⁷³ Feinberg discusses Kleinig's focus on moral blameworthiness in 'Harm to Others - A Rejoinder' above footnote 44 at 22-23; and Daly discusses the accounts given of the 'symbolic reparation sequence' for moral wrong in 'Revisiting the Relationship between Retributive and Restorative Justice' in Strang H & Braithwaite J (eds), *Restorative Justice: Philosophy to Practice*, (Aldershot, Ashgate, 2000) 33 at 44 and 48.

⁷⁴ Michael Moore, *Placing Blame*, (Clarendon Press, Oxford, 1997) at 194, my italics.

⁷⁵ HLA Hart, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) at 130, my italics.

sentence because of the special way that he himself uses the term wrongdoing. Moore has defined wrongdoing as 'causing harm to another without justification'⁷⁶ and has argued that 'the amount of harm caused determines the seriousness of the wrong done.'⁷⁷ Because he includes the concept of harm within the larger concept of wrongdoing (which, even more confusingly, he also distinguishes from the notion of wrongful action)⁷⁸ Moore tends to use the normative terms 'wrong' or 'wrongdoing' as direct substitutes for the more factual terms 'harm', 'actual harm' or 'harmful results'. For example, he often refers to 'the amount of wrong' or the 'amount of wrongdoing' when the sense of the passage indicates that we would normally say, as Hart did, 'the amount of harm'.⁷⁹ In this respect, although Moore has reversed the approach taken by Feinberg and Hall, he is open to the same criticism that he has adopted a special usage that strays from the ordinary meanings of the words and has misleadingly substituted one term for another. So, whereas I have criticised Feinberg and Hall for adding normative concepts into the factual concept of harm and using harm as a codeword for wrong or culpability, Moore must be criticised for the opposite tendency of hiding factual concepts inside normative terms and using the word wrong as code for harm. In both cases the ordinary difficulty caused by the use of a special code is exacerbated by the fact that the slip also conceals a qualitative

⁷⁶ *Placing Blame*, above footnote 74 at 334-335; see also the earlier passages at 33-45. It is difficult to track down Moore's precise understanding of these terms in *Placing Blame*, and one must agree with Alan Norrie who complains that the book 'is often quite hard to follow' especially 'in the part on wrongdoing' in 'Michael Moore's Deviation' (1999) 19 *Oxford Journal of Legal Studies* 111 at text at footnote 3, at 111. A simpler version of Moore's definitions can be found in two articles: 'An Exchange on the Nature of Legal Theory' (2000) 37 *San Diego Law Review* 731 at 736-737; and 'Victims and Retribution: A Reply to Professor Fletcher' (1999) 3 *Buffalo Criminal Law Review* 65 at 87. For critique of these views, see: Stephen Morse, 'The Moral Metaphysics of Causation and Results' (2000) 88 *California Law Review* 879 at 879-880; and Norrie A, *Punishment, Responsibility and Justice: A Relational Critique*, (Oxford University Press, 2000) at 93-116. Nicola Lacey points out that Moore appears to be unable to stick with his own distinctions in 'Book Review: Michael S Moore, *Placing Blame: A Theory of Criminal Law*' (2000) 63 *Modern Law Review* 141 at 146.

⁷⁷ Moore, 'Victims and Retribution' above footnote 76 at 87.

⁷⁸ See *Placing Blame*, footnote 74 at 78-80, where Moore summarises his views.

⁷⁹ See, eg, *Placing Blame*, above footnote 74 at 191-194. In fact, the concept of harm itself is given a remarkably short shrift in Moore's lengthy theory of the criminal law (the index gives only five entries) and this oddity may be accounted for by the fact that he tends to use wrong as a substitute.

move from the normative usage to the factual or descriptive usage. The problem is that Moore, unlike Feinberg and Hall, only rarely makes it clear that he has slipped from using the terms in their moral sense to using them in the factual sense.⁸⁰

This leads to even greater confusion when he criticises the views of others like George Fletcher who have also developed their own definitions of the same terms but who make distinctions that are at cross-purposes with Moore's own. (Fletcher has identified wrongdoing as the violation of a victim's interests and wrongfulness as violating a rule.)⁸¹ Typically, these exchanges over the meaning of the words take place in the footnotes to cryptic passages which are rendered more than necessarily opaque to the reader who is forced continually to translate the sentences in order to understand the arguments being made.⁸² So, when Moore says that the 'standard educated view' of attempts denies the 'independent moral significance of wrongdoing' we might at first be rather surprised, given that it would be nonsensical for anyone (whether educated or not) to doubt the moral significance of wrongdoing, a term which is on any view a moral one. However, once we look at the context in which the statement was made and realise that Moore is attacking the suggestion made by Joel Feinberg and many others,⁸³ that because actual results should not matter to desert there should be equal punishment for failed attempts, it becomes clear that Moore must be understood as making the much less outlandish claim that the standard educated view denies the independent moral significance of *causing harm*.

Similarly, where Moore asserts that 'Culpability is necessary to desert, but wrongdoing is not',⁸⁴ his real point is that while culpable action is essential to moral blameworthiness, actually succeeding in causing a specified harm is not, in his view,

⁸⁰ A rare example is when he rephrases the title of a section 'Does Wrongdoing Matter to our Overall Deserts?' as 'does the causation of bad results matter to our moral responsibility or not?' See *Placing Blame*, above footnote 74 at 218.

⁸¹ See Fletcher GP, *Basic Concepts of Criminal Law*, (Oxford University Press, 1998) at 77-78. Albin Eser makes a similar distinction between formal wrongdoing and a detrimental interference with a protected object of the law in 'A Comparative Analysis' above footnote 49 at 352 and 369.

⁸² See, for example, the discussion at 192-195 of *Placing Blame*, above footnote 74, and footnote 2 on page 193, where Moore attacks the way that George Fletcher and Lawrence Crocker use the terms.

⁸³ *Placing Blame*, above footnote 74 at 193-194. See Moore's references in the text at footnotes 6 to 17 for a full list.

⁸⁴ *Placing Blame*, above footnote 74 at 193.

a necessary requirement. Moore's special usage is made clear by the sentence that follows immediately upon the one just quoted, where he goes on to argue that someone 'who shoots at another with the intent of killing him, but misses, ... deserves some punishment even though *there is no wrongdoing*.'⁸⁵ This unusual use is made all the more clear when he criticises George Fletcher for 'relaxing what wrongdoing is' because Fletcher allows that attempting is 'a "wrong"'.⁸⁶ However, despite the fact that most people would (and the criminal law, in fact, does) classify attempting to murder another as wrongdoing, Moore is led to attack Fletcher for his improperly relaxed attitude because Moore's own definition allows that only conduct which actually causes a forbidden harm can count as 'wrongdoing'.⁸⁷ As it happens Moore does believe, as does Fletcher, that it is morally wrong to try to murder another person, that such behaviour ought to be punished if there is no valid defence, and that successful murderers deserve greater punishments than those who fail in their attempts,⁸⁸ but because Moore has adopted a private meaning for the term, he makes the misleadingly controversial claim that shooting and missing is not wrongdoing. The result is that the reader may be left with the apparent contradiction that although Moore thinks that such conduct is highly culpable, morally blameworthy, and deserving of punishment, he does not think that it is wrongdoing. However, this appears to be a risk that Moore is willing to take.

6.6 Assessing the normative accounts

These examples were chosen as a representative sample to show that Feinberg's worry about the proliferation of special meanings given to the term harm was amply justified. This is especially true when we move beyond Feinberg's own work and

⁸⁵ *Placing Blame*, above footnote 74 at 193, my emphasis.

⁸⁶ *Placing Blame*, above footnote 74 at 193, see text and footnote 2.

⁸⁷ *Placing Blame*, above footnote 74 at 49. Heidi Hurd, like Moore, also argues that wrongdoing can be conceived of only as successfully causing a prohibited harm: see 'What in the World is Wrong?' (1994) 5 *Journal of Contemporary Legal Issues* 157. For critique see: Alexander L, 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1, text at footnotes 74-81; and Simons KW, 'Deontology, Negligence, Tort and Crime' (1996) 76 *Boston University Law Review* 273.

⁸⁸ Moore, *Placing Blame*, above footnote 74 at 193 and 247. Hurd agrees that unsuccessful attempts are not wrongdoing, and also maintains at the same time that this conduct renders the unsuccessful attempter 'highly culpable' and deserving of punishment: see Hurd 'What in the World is Wrong?' above footnote 87 at 196.

survey the huge range of material devoted to the philosophical justifications of punishment where we find the qualitatively different concepts of harm, culpability and wrongdoing being linked together in different combinations. Hall added the normative aspect of moral culpability into his understanding of penal or criminal harm. Feinberg goes further and adds the concepts of wrongdoing, fault and the indefensible violation of rights into his extended definition of harm. By contrast with Feinberg, who takes great care to make it clear when he has abandoned the ordinary meaning and shifted over to the special normative sense that he needs when he is discussing the moral limits of the criminal law, and others like Burgh and Becker who indicate their special normative usages with a qualifying adjective, Michael Moore has hidden a factual sense of harm inside the normative concept of wrongdoing and slips between using the term in a normative and non-normative sense without making it clear when he does so.

The proliferation in the numbers of different theories about punishment and criminal law, which are themselves based on different accounts, not only of the term harm, but also of culpability and wrongdoing and the relationships between them, can make the task of analysis and communication very difficult. My point is not that all of these different academic interpretations are necessarily wrong in substance. In fact, I have argued that even though many of these accounts fail as accounts of harm, they have led us to an illuminating account of the important role that the normative aspects of the social meaning of the conduct and the issue of fault play in our understanding of the concept of crime and the importance of identifying the community values which justify the decisions which our legislators and judges have made about the content and structure of the criminal law. The point is rather, that the use of these special extended meanings for terms that already have well-known natural meanings is unnecessarily confusing, and consequently a heavy burden of proof ought to lie on those who advocate their use. The need to remain faithful to the shared meanings of ordinary words in common usage is important in any context, but in the context of a criminal trial it is vital that both judges and lawyers use language that is readily understandable by all of the ordinary members of the community who are either involved in the system or who may be interested in the processes of criminal justice.

If legal philosophers abandon the shared meaning of these key terms and adopt their own inscrutable private meanings, their work becomes not only more difficult for others to follow, but it becomes even more unlikely that their theories can be of

any help either to the judges who actually decide upon the punishments that are given to offenders in the community's name or to the politicians who have to decide upon these crucial legislative issues as the community's representatives.⁸⁹ Indeed, the difficulty of following Feinberg's special definitions and usages may partly explain Stuart Green's puzzlement over the fact that Feinberg's 'magnum opus seems less well known than it should be'⁹⁰ and it is no surprise that the most influential of the current writers on sentencing are those who adopt the clearest language. The need for clear communication between academics, judges, politicians, members of the media and the general public (including offenders and the lawyers who represent them) means that, wherever possible, we should work from our shared understanding of these concepts. This will allow us to be sure what each person means by their contribution and stop us from arguing at cross-purposes when we debate these divisive moral issues. Instead of squabbling over our own idiosyncratic meanings,⁹¹ we will be able to focus our debates more properly on the moral meaning of our decisions about crime and punishment and the actual effects that those decisions may have on offenders and the community. An approach that accepts the possibility of a 'private language'⁹² in the legal context, as in any other, cements the probability of confusion into our debates – a confusion that can sabotage mutual understanding and destroy any chance we have of coming to agreement on these fundamental matters of broad community interest.

⁸⁹ Both Neil Hutton and Nicola Lacey have pointed out that philosophical debates over punishment have little impact on practice: Hutton N, 'Reflections' in *Sentencing and Society: International Perspectives*, Tata C & Hutton N (eds), (Ashgate, Aldershot, 2002) 575; Lacey N, 'Principles, Politics and Criminal Justice' in Zedner L & Ashworth A (eds), *The Criminological Foundations of Penal Policy*, (Oxford University Press, 2003) 79 at 93.

⁹⁰ Green SP, 'Feinberg's *Moral Limits* and Beyond' (2001) 5 *Buffalo Criminal Law Review* 1 at 1.

⁹¹ The writer is aware of the irony of this statement given that it appears after a number of chapters discussing the definition of harm and wrongdoing.

⁹² Wittgenstein argued that a 'private language' was an impossibility and that the home of language is not the 'inner world' but 'the life of the human community': Kenny A, *A Brief History of Western Philosophy*, (Blackwell Publishers, Oxford, 1998) at 341. Wittgenstein's analysis of the private language problem can be found in paragraphs 243-315 of his *Philosophical Investigations*, (Basil Blackwell, Oxford, 1968) at 88-104. See also Kenny A, *Wittgenstein*, (Allen Lane The Penguin Press, London, 1973) at 178-202. The inveterate tendency of legal philosophers to construct 'private definitions' that ultimately collapse under the weight of ordinary usage proves his point.

Chapter Seven

The Search for Meaning

and *The Moral Limits of the Criminal Law*

7.1 Feinberg and Duff: to be wronged is to be harmed

Feinberg's account of harm has been the subject of a number of criticisms, most recently in the special number of the *Buffalo Criminal Law Review* that was dedicated to his work on *The Moral Limits of the Criminal Law*.⁹³ In that volume, Antony Duff and Hamish Stewart⁹⁴ both discuss Feinberg's decision to include the concept of moral wrongfulness within the definition of harm and both analyse the way that this definition works to provide a significant limit on the reach of the criminal law. However, they begin with different premises and arrive at opposite conclusions. Duff attacks Feinberg for attempting to separate wrongfully caused harms from the conduct that brings them about because he believes that to be wronged is to be harmed, whereas Stewart, who bases his critique on the everyday meaning of harm, concludes that Feinberg's arguments would be advanced if he did not join the two distinct concepts of harm and wrong together in the one definition.

Antony Duff has argued in his contribution to the tribute volume that Feinberg's account of harm is flawed because 'by abandoning the idea of harming simply as wronging'⁹⁵ Feinberg has 'lost touch with the conception of harm that informs our responses to, and understanding of, criminal attacks on our interests.'⁹⁶ In the section

⁹³ The special number, edited by Stuart Green, is found at (2001) 5 *Buffalo Criminal Law Review*.

⁹⁴ Duff RA, 'Harms and Wrongs' (2001) 5 *Buffalo Criminal Law Review* 13 (hereafter: Duff, 'Harms and Wrongs'); Stewart H, 'Harms, Wrongs and Set-Backs in Feinberg's *Moral Limits of the Criminal Law*' (2001) 5 *Buffalo Criminal Law Review* 47.

⁹⁵ Duff, 'Harms and Wrongs' at 17. It is debatable whether Feinberg ever did equate harming with wronging as Duff suggests in this passage. Feinberg argued that only conduct that is both wrongful and harmful could justifiably be criminalised and so could be called "harm" in the special sense.

⁹⁶ Duff, 'Harms and Wrongs' at 23. See also 'Rule-Violations and Wrongdoings' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 47 at 58.

of his article entitled 'Harm and Wrongdoing' Duff concludes that Feinberg has made a fundamental mistake by first identifying a wide class of harm in 'morally neutral terms' (Feinberg's harm₁) and then attempting to carve out a special subgroup of 'wrongfully caused harms' (Feinberg's normative harm₂) from within that broader factual class.⁹⁷ Duff argues that it is not possible to understand harm in its criminal sense as analytically separate from the violation constituted by the offender's wrongful action and suggests that 'wronging another' can 'harm that person just by virtue of being a wrong.'⁹⁸ If Duff's claims are correct then it may be that the definitions of harm and wrongdoing developed in the previous chapter will need substantial revision because as Duff himself pointed out, before we can continue, 'we must first get clear about the notions of harm and wrongdoing, and the relationship(s) between them.'⁹⁹

At first glance, Duff's criticism of Feinberg is surprising, because Duff has developed over a number of years a thoroughly normative understanding of harm,¹⁰⁰ which is so similar to Feinberg's account that it has attracted much the same criticism.¹⁰¹ In 1996, for example, when Duff was discussing the law of attempts, he argued that 'even if my action causes you no material harm, I have done you an injury: for I have wronged you; and to be wronged is to be harmed.'¹⁰² Duff's distinction between 'material harm' and the different kind of harm or injury that he

⁹⁷ Duff, 'Harms and Wrongs' at 25.

⁹⁸ Duff, 'Harms and Wrongs' at 25-26. See also *Criminal Attempts*, (Oxford University Press, 1996) at 340: a person can be 'harmed, in and by being wronged'.

⁹⁹ Duff, 'Harms and Wrongs' at 16.

¹⁰⁰ Duff RA, *Intention, Agency and Criminal Liability*, (Blackwell Publishers, Oxford, 1990) at 105-115, 202-203; *Criminal Attempts*, above footnote 98 at 132-133 and 363-374; 'Subjectivism, Objectivism and Attempts' in Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996) 19 at 37-41; *Punishment, Communication and Community*, (Oxford University Press, 2001) at 128; 'Restoration and Retribution' in von Hirsch et al (eds), *Restorative Justice and Criminal Justice*, (Hart, Oxford, 2003) 43 at 47-48.

¹⁰¹ See Stewart H, 'Book Review: *Harm and Culpability*' (1997) 47 *University of Toronto Law Journal* 407 at 407 (Feinberg) and 409 (Duff). See also Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269 at 284.

¹⁰² Duff, 'Subjectivism, Objectivism and Attempts' above footnote 100 at 37, his footnote 68. This is very similar to the views noted above in footnote 98. See also Culver K, 'Analyzing Criminal Attempts' (1998) 11 *Canadian Journal of Law and Jurisprudence* 441 at 453.

equates with the normative concept of being wronged appears to be very similar to the two senses of harm that Feinberg has identified and Duff has attacked. Duff's reasoning in this sentence turns on the meaning of the word 'injury' which, as we saw in section 6.3, can refer to the normative aspect of moral wrongdoing or to the more straightforward factual aspect of damage, hurt or loss. The ordinary ambiguity of the word makes the interpretation of Duff's argument difficult, precisely because we do not know whether he has used injury in its normative sense, or in its factual sense, or whether his argument, like Jean Hampton's, was designed to take advantage of the word's double meaning. Duff's highly compressed argument, which shifts from the issue of material harm to the normative issue of wrong and then back to the issue of harm (in an unspecified sense), appears to allow for the possibility of a logical slip from one connotation of injury to the other when it pivots around this crucial word which lies at its centre. The argument is:

1. I caused you no harm in the material sense.
2. However, I have done you an injury because I have wronged you.
3. Therefore, I have harmed you by my action, because to wrong someone is to harm them. (Sense of harm is unspecified.)

The first proposition clearly refers to harm in the factual sense. The second proposition is ambiguous, but the better interpretation is that Duff must be using injury in its normative sense, because if he has used it in the factual sense as a synonym for harm, it would contradict his first statement. If he has used the word injury in the normative sense, then the second proposition is uncontroversial because it is by definition true. But while the proposition is true, it is also redundant, and establishing its truth does not necessarily lead us to Duff's conclusion.

The problem in the final conclusion is that the sense in which Duff is using the word 'harmed' is not made clear; the justification for the assertion that 'to be wronged is to be harmed' is not fully explained; and the use of 'injury' as the key does not assist us to decide the matter.¹⁰³ If Duff has concluded that the action is injurious or

¹⁰³ The problem is that the ambiguity in the word injury which is used in the second proposition lends the argument a logical feel. Because we know that the word injury can be a synonym for harm, it appears as if the second proposition leads directly to the conclusion, however, we cannot rely on the fact that 'injury' has been proved in the second proposition to justify the final conclusion because we have ruled out the possibility that Duff can be using it in that factual sense. All that the first two points establish is that the action has wronged the victim, and that it has not harmed the

harmful in the normative sense, then it seems that he has indeed done the same thing that he has criticised Feinberg for doing and has distinguished two senses of the word harm: the material or factual sense appears in his first proposition and the normative sense appears in the conclusion. But Duff, unlike Feinberg, has obscured the fact that he has invoked the two senses of harm by using injury, with its double meaning, to do double duty in his argument and this allows him to present what is really no more than an assertion of his view that 'to wrong is to harm' in the form of a logical deduction.¹⁰⁴ We could try to rescue Duff from this charge by interpreting the conclusion as referring to the factual or material sense of harm, but this approach must also be ruled out because the argument, if stated in those terms, becomes self contradictory: Duff cannot be taken to be suggesting that the action both did and did not cause material harm.¹⁰⁵

The confirmation that Duff's second use of harm refers to harm in a normative sense is to be found in his assertion on the page following this argument, that it is important to bring an offender to understand 'the moral and the material injury that he has caused'.¹⁰⁶ Given that Duff, like Hampton, does believe that there are two kinds of harm, the material and the moral, it seems that Duff's intriguing argument in 'Harms and Wrongs' is that while there are two senses in which offences may be harmful or injurious, the purely factual, non-moral sense is not logically primary to the normative or moral sense in the way that Feinberg has suggested,¹⁰⁷ and that when it comes to the criminal law, these senses cannot be separated. However, it does not logically follow, merely from the assertion that 'to be wronged is to be harmed' that harm must always include some aspect of wrongfulness and Duff's attack on Feinberg on these grounds must fail. Furthermore, if we consider the natural meaning of the word harm, these statements seem to be plainly unsustainable, because, as we have

victim in a material sense. This leaves the conclusion unproved. So, although the sentence is structured to look like an argument that leads up to and justifies a conclusion, in fact, it is not an argument, but an assertion that 'to be wronged is to be harmed.'

¹⁰⁴ See my expansion of this point in the footnote above.

¹⁰⁵ This would be a real contradiction and not an example of the paradox of harm which I identified in section 2.2 of Chapter Two.

¹⁰⁶ Duff, 'Subjectivism, Objectivism and Attempts' above footnote 100 at 38. He discusses this kind of moral injury in the later article 'Harms and Wrongs' at 25, text at footnote 38.

¹⁰⁷ Duff, 'Harms and Wrongs' at 25.

seen, the way that we use the concepts of harm and injury does allow us to differentiate, as Duff himself does, between different kinds of harm and different ways of causing harm, as well as between the factual and the moral senses of the word injury. Moreover, in its ordinary sense, harm is not restricted to wrongful harming, or even to human actions, and so the justification for Duff's claim that there is no possible way that we can understand harm in the 'Feinbergian' sense,¹⁰⁸ cannot be based on the ordinary meaning of the concept of harm. It must either be read as a prescriptive claim to the effect that we should not try to separate the two senses of harm, or it must be based on some other special insight which may be gleaned from Duff's understanding of intentional wrongdoing as an attack on the victim.

What appears to concern Duff above all is that 'the sense of violation' which constitutes part of the injury that the victim suffers in a criminal attack like a burglary 'is not separable from that wrongful human act' or the 'causally contributory action' that itself constitutes the unlawful invasion or violation of the victim's privacy and autonomy.¹⁰⁹ Duff reiterates that Feinberg's 'account of harm as a consequence of wrongdoing has no place even for a distorted version' of this relevant harm, because:

The violation of my privacy is not a consequence of the burglar's breaking and entering; it is what his action *means* (nor again can we identify the harm with the feeling of violation: the harm is the violation itself; the feeling is my recognition of the harm).¹¹⁰

So, the point that Duff appears to be making is not just that we cannot (or should not) separate the different senses of harm, but that we cannot separate the moral sense of harm from the wrongful conduct itself: the harm from the harming. This is consistent with his point made in *Punishment, Communication and Community*, that:

The harm suffered by the victims of central *mala in se* crimes (such as murder, rape, theft, violent assault) consists not just in the physically, materially, or psychologically damaging *effects* of such crimes but in the fact that they are victims of an *attack* on their legitimate interests – on their selves. The harmfulness and the wrongfulness of such attacks lies in the malicious, contemptuous, or disrespectful intentions and attitudes that they manifest as well as in their effects.¹¹¹

¹⁰⁸ Duff, 'Harms and Wrongs' at 23.

¹⁰⁹ Duff, 'Harms and Wrongs' at 24. See also references in footnote 106 above.

¹¹⁰ Duff, 'Harms and Wrongs' at 24, original emphasis.

¹¹¹ Duff, *Punishment, Communication and Community*, above footnote 100 at 128, original emphasis.

Duff's three conclusions: that to be wronged is to be harmed; that we cannot separate the non-moral sense of harm from those harms wrongfully caused; and that the concepts of harm and wrongdoing are not analytically separate in the way that Feinberg has suggested because we cannot distinguish between the wrongful harm done by an action and the wrongfulness of the action itself, have deep implications not only for our legislative project, but equally importantly, for the approach that we must take to sentencing offenders for their crimes. If Duff is right, we must give up any hope of constructing a model of a crime and the sentencing decision by reference to the separate concepts of harm and wrongdoing¹¹² and we will be forced to rely instead on a primitive form of 'intuitive synthesis'¹¹³ which seems to be the only approach that could fit with Duff's conclusions. But Duff cannot be right: the first of his claims is demonstrably untrue, and the remaining claims are self-refuting, as Duff's own arguments reveal.

We can demonstrate the falsity of Duff's claim that 'to be wronged is to be harmed' by reconsidering the analysis of the ordinary meaning and usage of the two concepts of harm and wrongdoing that was developed in Chapters Two and Three. In those chapters I argued that the two concepts are conceptually distinct and I gave examples that showed that they are not co-extensive. Harm lies in the adverse effect of an event that makes something worse off; harming refers to the conduct that is the cause of such an effect; and, regardless of whether the conduct causes harm or not, wrongdoing refers to the social meaning ascribed to conduct that deviates from a rule thought to be right. Given that we cannot conclude that any conduct was harmful unless we can first establish that it has caused someone or something to be worse off

¹¹² We might also include fault as well: the extract above, footnote 111, suggests that the offender's fault, as much as the social meaning of the conduct as an attack, informs Duff's understanding of the (inseparable) harm-and-wrong.

¹¹³ I do not have any objections to the use of 'intuitive synthesis' when it comes to determining the quantum of punishment, provided that the sentencing decision making process is a) guided by a coherent set of sentencing principles, b) informed by knowledge of the patterns identified within past sentencing decisions, and c) is also subject to appellate review. However, Duff's position would make the first of these conditions impossible. I have already explained my objections to any kind of synthesis of the so-called 'purposes of punishment' in the Introduction to this thesis. See also the views of Cyrus Tata, referred to in footnote 7 above.

than it was before, we can agree with Feinberg that it is possible to conceive of harm as separate from and in one sense primary to the conduct that caused that effect.

It is possible to harm another without wronging them, for example, in cases of pure accidents,¹¹⁴ and so even if Duff is right and all wronging is harmful, the fact that not all harming is wrongful points to a distinctive space where even humanly caused harm does exist in the 'Feinbergian' non-normative sense. However, Duff's assertion that to wrong is to harm cannot be maintained, because it is also possible to wrong another without doing any harm to them at all. If I had suspected that my neighbours had killed my cat and poisoned my trees, when in fact they had all died from natural causes, I would have wronged my neighbours, but the suspicion alone could not have harmed them unless I acted on my belief. The fact that we can wrong others in our thoughts, but can only harm them by actual conduct¹¹⁵ creates another space where Duff's claim does not hold true.¹¹⁶ Even in cases where external, as opposed to internal, conduct has taken place, there are examples where harm does not necessarily follow from the fact of the wrong: a married person's secret adultery may wrong their spouse, but it does not necessarily harm them; lying to another may wrong the hearer but it may do that person no harm; just as betraying a confidence might wrong another without necessarily doing any harm. As AP Simester and Andrew von Hirsch have pointed out, to hold that any wronging or invasion of a right amounts to a harm is not only to 'collapse the distinction between harms and wrongs', it also disguises 'without dissolving the problem posed by harmless wrongdoing.'¹¹⁷

¹¹⁴ See the example of the rubbish compactor operators who unwittingly crushed a child who had crawled into a box put out for collection, discussed in Chapter Three, section 3.1.

¹¹⁵ See section 3.1 in Chapter Three and my summary in section 4.1 and Table 4.1 in Chapter Four.

¹¹⁶ Duff doubts Feinberg's view that there can be harmless wrongdoing in 'Harms and Wrongs' at 25-26. See Feinberg's discussion in: *Harm to Others* at 34-36; and *Harmless Wrongdoing* at xxvii-xxix.

¹¹⁷ Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269 at 284. Similar criticism could be made of Duff's move in 'Subjectivism, Objectivism and Attempts' above footnote 100 at 40-41, to characterise the action of one 'who attacks with the intention of causing some legally relevant harm' as 'intrinsically or essentially harmful even if the harm does not in fact ensue' and the views of Hyman Gross cited by Parker R, 'Blame, Punishment and the Role of Result' (1984) 21 *American Philosophical Quarterly* 269 at 272-273: 'harmful conduct is conduct which may or may not cause harm'.

Even though the criminal law contains examples of legal wrongdoing where no actual harm is necessarily done (for example, interference with human remains) it might be argued that in the context of the *mala in se* victimising attacks which Duff focuses on, most cases of wronging another will also result in harm. However, even where harming and wronging do coexist, they are nevertheless, analytically distinct, independent concepts, each with a different connotation and a separate emotional base.¹¹⁸ In fact, Duff's claim that 'to be wronged is to be harmed' would have no point and no power unless there was a logical distinction between the two concepts, which can be encapsulated in the difference between affect (in the sense of an emotional response) and effect (in its ordinary sense).

Duff's remaining claims, that we cannot understand the difference between the two classes of harm, ie, harm in a morally neutral sense and harm that is the result of wrongful conduct, and that we cannot distinguish between the relevant harm and the wrongfulness of the conduct itself, are manifestly self-refuting. In order to make the claims and the arguments supporting them, Duff has to make use of the distinctions that he says we should not make, just as he had to make use of them when he argued that 'to be wronged is to be harmed.' Moreover, these distinctions would not even exist unless, in addition to the fact that it is possible to make them, they also serve a useful purpose in our debates, and the preceding analysis of Duff's own arguments shows just how useful these distinctions can be. The fact that we can devise matching cases and vary them by reference to one or other of the three concepts of harm, wrongdoing and fault, shows that each of the three has something different to contribute to our understanding of any given event and that each is an independent concept that does not need to be defined in terms of the others.¹¹⁹ Surveys of the perceived seriousness of crimes reveal that the factual aspect of harmfulness can indeed be separated from normative assessments of wrongfulness and that 'conventional classes of crimes systematically differ on the two dimensions'.¹²⁰ John

¹¹⁸ See section 3.1 in Chapter Three and my summary in section 4.1 and Table 4.1 in Chapter Four.

¹¹⁹ The usefulness of these distinctions was also revealed in the discussion of two different cases of wounding in section 3.3 of Chapter Three. There one wounding was characterised as a vicious attack motivated by hatred; the other as an over-paternalistic intervention motivated by a kind intention of helping the patient and which did in fact benefit the victim in the long term.

¹²⁰ Warr M, 'What is the Perceived Seriousness of Crimes?' (1989) 27 *Criminology* 795 at 795. See also Robinson P, 'Testing Lay Intuitions of Justice' (2000) 28 *Hofstra Law Review* 611.

Gardner and Stephen Shute's recent analysis of 'The Wrongness of Rape'¹²¹ also demonstrates that we can logically discuss *mala in se* crimes, even one like rape that is a paradigmatic example of an invasive attack that violates a victim, in terms of wrongfulness and harmfulness and that this kind of academic discussion can add to our understanding of those crimes.

A close examination of Duff's discussion of harm and wrongdoing in the excerpts quoted above and the accompanying passages from his article discussing Feinberg's use of the terms, reveals the ease with which Duff is able to construct an argument that not only makes use of the logical distinction between harm itself and the nature of the conduct that may cause harm, but which also draws upon the different emotional bases that power these concepts. If we bear the ordinary definitions in mind it very quickly becomes apparent that his emphasis is consistently on the normative, and that his focus is on the nature and meaning¹²² of the offenders' conduct (as an attack¹²³ or a violation), and the fault of the offenders (as it is manifest in their 'malicious, contemptuous, or disrespectful intentions and attitudes'¹²⁴). The fact that Duff's evidence for his claims is to be found in the meaning of the conduct and the intentions of the offenders suggests that his 'moral harm' is much the same as Hampton's 'moral injury', Hall's 'penal harm', and Feinberg's special "harm" or harm₂, in that all three operate as code, in some cases for wrongdoing alone, and in others for harm plus wrongdoing (and/or fault) and demonstrates again that the difference between the normative aspects of the crime and the factual ones can sometimes be confused in cases when the harm is closely associated with the wrong.¹²⁵ However, once it is clear

¹²¹ Gardner J & Shute S, 'The Wrongness of Rape' in Horder J (ed), *Oxford Essays in Jurisprudence*, Fourth Series, (Oxford University Press, 2000) 193.

¹²² See Duff's own emphasis on meaning in the extract above, footnote 110.

¹²³ Duff has written extensively on the notion of conduct as an attack: see 'Harms and Wrongs' at 21; *Criminal Attempts* above footnote 98 at 32, 115, 221 and 363-368; 'Subjectivism, Objectivism and Attempts' above footnote 100 at 37-41; *Intention, Agency and Criminal Liability* above footnote 100 at 111-115; *Punishment, Communication and Community*, above footnote 100 at 60-65; and Marshall SE & Duff RA, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7.

¹²⁴ See the two passages extracted above at footnotes 110 and 111.

¹²⁵ See Hampton, 'Correcting Harms' above footnote 49 at 1661: 'we can be misled by the harm and mistake it for the wrong'. Similar criticism could be made of Joanne Conaghan, 'Law, Harm and Redress: a Feminist Perspective' (2002) 22 *Legal Studies* 319 who describes the change in attitudes

that the real function of these terms is to characterise the conduct and the responses of the actor, and not to describe the kind of worsening effect that the actor's conduct has caused, the need to invent or use these special normative 'harms' disappears and any suggestion that we should abandon the definitions that are based on the ordinary meaning of the terms can be rejected.

Another reason for refusing to include these accounts of 'social harm', 'moral harm' or 'wronging as harming' as any part of a definition of harm that is to be used in sentencing is the fact that all of the important issues that rightly preoccupy Duff, Hampton and Hall (the social meaning of the conduct as a violation of the victim; our reading of the conduct as an attack on the shared, defining values of the community; and the antisocial intentions and attitudes that are manifest in the conduct of offenders) can easily be taken into account as relevant factors under a sentencing model that evaluates the seriousness of a crime by assessing the three distinct aspects of harm (as effect), wrongdoing (as the social meaning of the conduct) and fault (as reflected in the offenders' responses to their circumstances and their failure to respect proper values).¹²⁶ This suggests that the current conception of the seriousness of a crime as consisting only of the two elements of harm and culpability is flawed and that all of these commentators are right to try to find a way to bring the aspect of the social meaning into our calculations, because, as I argued in Chapter Four,¹²⁷ we lose something important if we leave that aspect out of our understanding of the crime. However, while their reasons for drawing this aspect to our attention are right, their characterisation of that aspect as a special kind of 'moral harm' or 'distinctively criminal harm' is not. I will argue in Part IV that the solution to the problem that they have identified lies not in developing a special extended sense of harm, but in modifying our understanding of the elements of the seriousness of a crime and will show that a model that is based on the ordinary meanings of the three aspects of harm, wrongdoing and fault is comprehensive enough to take into account all of the factors

to the smacking of children in terms of society's new recognition that smacking is a harm (at 322). However, her description of the practice as an 'abuse' of the child and a 'violation of parental obligations' suggests that the change could equally well be described as a recognition of the wrongfulness of the physical discipline of children. I address this issue in section 11.3 of Chapter Eleven where I discuss the defences.

¹²⁶ See section 4.3 in Chapter Four.

¹²⁷ See Chapter Four of Part I.

generally thought to be relevant both to the legislative and to the sentencing decision. Furthermore, if we inform our analysis by reference to the fundamental social values that animate the criminal law and emphasise the links between these three aspects of the seriousness of a crime and our shared commitment to welfare, autonomy and equal respect for others, we will be able to come to a deeper understanding of the meaning of criminal offences and our responses to those who commit them.

Any model of a crime, including Duff's model of criminal punishment as moral communication based on a 'shared language of values',¹²⁸ must first respect the shared language that expresses those values. If we adopt an understanding of the seriousness of a crime that considers each of the different aspects of harm, wrongdoing and fault, and is able to link those three aspects with the key values of welfare, autonomy and respect, we will be able to arrive at the 'more richly conceived'¹²⁹ account of criminal cases that Duff desires without having to adopt any special terminology that subverts the ordinary use of language. Making those links is not always easy, nor is the task uncontroversial, and although it will be necessary to consider the difference between harming and wronging for a second time in Chapters Nine and Ten, which will take up the task of making these links, it is not necessary to alter our understanding of the concepts of harm, wrongdoing or fault to accommodate Duff's legitimate concerns and it must be concluded that his criticism of Feinberg's account of the distinction between harm and wrongdoing is unsustainable. However, while this analysis has shown that we need not adopt Duff's understanding of 'wronging as harming', it has also confirmed that the current understanding of a crime as consisting only of harm and culpability does not adequately capture all that we mean to respond to when we decide to criminalise conduct thought by the community to be so wrong that punishment should follow upon proof of its commission.

¹²⁸ Duff RA, 'Punishment, Communication, and Community' in Matravers M (ed), *Punishment and Political Theory*, (Hart Publishing, Oxford, 1999) 48 at 57. See also Duff RA, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of Legal Studies* 189 at 201, and Griffin J, *Value Judgment*, (Clarendon Press, Oxford, 1996) at 7-10. See also footnote 178 below.

¹²⁹ Duff, *Punishment, Communication and Community*, above footnote 100 at 128.

7.2 Feinberg and Stewart: separating wrongdoing and harm

The fact that Duff's criticism of Feinberg's distinction between harm and wrong cannot be sustained does not mean that Feinberg's definition of harm, which includes the separate aspect of wrongdoing within it, is therefore free of criticism. Hamish Stewart repeats in 'Harms, Wrongs and Set-Backs in Feinberg's *Moral Limits of the Criminal Law*' the charge against Feinberg, which he had earlier levelled at Feinberg, Antony Duff and Grant Lamond when reviewing the book *Harm and Culpability*, namely, that all of these writers have invoked 'a concept of harm so expansive that it effectively includes an independent notion of wrongfulness.'¹³⁰ Stewart argues that it is wrong to assimilate these two 'distinct, irreducible normative principles' and suggests that Feinberg would do better to separate the two concepts and define harm as a 'set-back to interests' and wrong as the 'violation of right'.¹³¹ After he points out that Feinberg himself tends either to abandon his own definition or to assume rather than to justify its operation,¹³² Stewart goes on to make the more telling criticism that Feinberg's conflation of these two distinct principles hampers the role that each one can play in any arguments that might be advanced for and against criminalisation. For example, he argues that by including the notion of rights in his definition, Feinberg rules out 'the possibility of defining rights just to protect persons from certain setbacks to interests'¹³³ and suggests that Feinberg's discussion of the idea of wrongfulness is 'left incomplete, with the result that much of his analysis relies on an

¹³⁰ Stewart H, 'Book Review: *Harm and Culpability*' (1997) 47 *University of Toronto Law Journal* 407 at 408, reviewing Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996). Stewart makes the criticism of Feinberg in 'Book Review' at 407, text at footnote 1; of Lamond at 408; and of Duff at 409. He develops the point at length in relation to Feinberg in 'Harms, Wrongs and Set-Backs in Feinberg's *Moral Limits of the Criminal Law*' (2001) 5 *Buffalo Criminal Law Review* 47 (hereafter: Stewart, 'Harms, Wrongs and Set-Backs'). See also Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269 at 283-285.

¹³¹ Stewart: 'Book Review' above footnote 130 at 407; 'Harms Wrongs and Set-Backs' at 49 and 65. A similar point is made by Andrew von Hirsch in 'Injury and Exasperation: An Examination of Harm to Others and Offense to Others' (1986) 84 *Michigan Law Review* 700 at 702, however, von Hirsch is more concerned with Feinberg's cursory treatment of the element of culpability and the way Feinberg's definition melds harm with culpable wrongdoing. I agree with Stewart that the two concepts are distinct, but I do not agree that they are both normative.

¹³² Stewart, 'Harms Wrongs and Set-Backs' at 49.

¹³³ Stewart, 'Harms Wrongs and Set-Backs' at 51.

implicit and rather intuitive specification of what a person's rights are.'¹³⁴ In one sense, the strength of Stewart's criticism that Feinberg conflates the two concepts is somewhat reduced because although Feinberg includes wrongdoing in his definition of harm, he does maintain that there is a difference between the two concepts (thereby attracting Antony Duff's attention), and as we have seen above in sections 6.1 and 6.2, Feinberg takes steps to make sure that the two senses in which he uses the term harm are clearly differentiated. However, the point remains, that in the hands of someone less careful than Feinberg, his definition has the potential to mislead.

Stewart's suggestion that Feinberg's arguments would be advanced by keeping the concepts separate is similar to the point made by Heidi Hurd, who has also argued that 'there is nothing gained by equating harm and wrong, and much lost'¹³⁵ because if we do, we would 'have two words for one concept and none for another.'¹³⁶ Hurd argues that if wrong is equated with harm then we cannot make the claim that one 'who maims another in self defence, for example, inflicts a harm.'¹³⁷ Again, it might be argued on Feinberg's behalf that he did not equate the two concepts, he merely made both of them necessary conditions for the criminalisation of certain kinds of conduct. Consequently, he would be able to argue that someone who maims another in self defence does in fact harm that person in the ordinary sense by setting back their interests, but, because they acted justifiably in defending themselves, they cannot be said to have "harmed" the other person in the special sense.¹³⁸ Again, however, one must wonder why Feinberg felt the need to develop two senses of harm when there were already two separate concepts at his disposal that could have done the job better and avoided any confusion. All we need to say to make the point is that, provided one has acted reasonably and proportionately, it is not wrong to harm another in self defence, and so such conduct should not be criminalised.

¹³⁴ Stewart, 'Harms Wrongs and Set-Backs' at 52.

¹³⁵ Hurd, 'What in the World is Wrong?' above footnote 87 at 210.

¹³⁶ Hurd, 'What in the World is Wrong?' above footnote 87 at 211. Curiously, and despite the fact that Hurd criticises Feinberg for developing a definition of harm that fails to capture the common conception of harm, she puts forward an account of wrongdoing that neither fits with ordinary usage (or in her words at 189 'would not play in Peoria') nor with current legal liability.

¹³⁷ Hurd, 'What in the World is Wrong?' above footnote 87 at 209-210.

¹³⁸ See, for example, *Harmless Wrongdoing* at xxviii, where Feinberg describes an injury to which a person has consented as a 'wrongless harm₁'.

I will take up the issue of why Feinberg resorted to developing his special sense of harm below. However, the examples given by Hurd and Stewart, which are based upon the ordinary usage of harm,¹³⁹ do make it clear that any definition of harm that includes the concept of wrongfulness as one of its distinct components will force our arguments about the limits of the criminal law into a very different shape by comparison with one that keeps them separate. These examples remind us that Feinberg himself specified that his account of harm was designed to serve his own purposes and was not a dictionary definition,¹⁴⁰ but in fact, although Feinberg claims to have constructed a definition, his final six-part list is not really a definition of harm at all. Rather it operates as a list of elements which, if all are present, may justify criminalising the conduct they describe, and so I suggest that it is better conceived of as a generic description of a certain kind of crime,¹⁴¹ rather than a definition of harm.¹⁴² If we treat Feinberg's account as a definition of harm and try to apply it to another purpose (even in the very closely related context of our debates over punishment and sentencing) it is not possible to make readily understandable claims without also having to adopt unnecessary circumlocutions to aid in the attempt. Feinberg's own discussion of whether death is a harm or whether it is possible to harm the dead, which was greatly hampered by his own definition, provides a clear example of this problem.¹⁴³

When we turn to the issue of punishment, this aspect of Feinberg's work gives great cause for concern, not on the merely technical grounds relating to the purity of his definition or the correctness of his use of words, or even because of the rather

¹³⁹ Hurd, 'What in the World is Wrong?' above footnote 87 at 211; Stewart, 'Harms, Wrongs and Set-Backs' at 65.

¹⁴⁰ See footnote 26 in Chapter Six, above.

¹⁴¹ Following Glanville Williams's distinction between a mere description and a definition (something that states or controls the use of words), I would suggest that Feinberg has produced an (incomplete) description of a certain kind of crime: see Williams G, 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107 at 109.

¹⁴² Even if we do treat it as a definition of criminal conduct, it is incomplete. Feinberg's other volumes show that there are other justifications for criminalising conduct beyond the fact that it risks harm.

¹⁴³ See *Harm to Others* at 79-95. For an analysis of the difficulty in applying Feinberg's definitions in these cases see Thomson JJ, 'Feinberg on Harm, Offense, and the Criminal Law: A Review Essay' 15 (1986) *Philosophy and Public Affairs* 386 at 388-393. I discuss the issue of whether death is a harm in section 9.2 of Chapter Nine.

comical self contradictory sentences that it sometimes gives rise to, but more importantly, because of the kind of claims that such a definition would force us to accept. For example, if we adopted Feinberg's first definition of harm as a wrongful setback to interest, we would have to conclude that because state punishment is not wrongfully imposed in violation of an offender's rights, the state does not harm offenders when it punishes them. This kind of claim is seriously disturbing and is perhaps the strongest reason why we should not use Feinberg's account of harm. Punishment by definition imposes hard treatment designed to induce pain or suffering on offenders,¹⁴⁴ and it is precisely because it does harm offenders (and their families and employers) that punishment requires justification.¹⁴⁵ Any definition of harm that forces us to deny the harm done by state punishment not only clouds our thinking, even worse, it warps our thinking. As Markus Dirk Dubber has convincingly argued in his review of the rise of rehabilitation theory, it is positively dangerous to follow a theory of punishment that denies the pain suffered by those whom we punish; once punishment is viewed as a good and not an evil, the gate is opened for the state to 'punish what it wants, whom it wants and how it wants, few questions asked.'¹⁴⁶ If punishment is not recognised as doing harm we would have no reason to consider placing any limits on it at all, in fact if punishment is a good, we have a reason to maximise it, not to limit it. For this reason above all others, we must resist any move to take Feinberg's extended definition of "harm" outside the narrow limits that he himself placed around it.

¹⁴⁴ See section 5.2 above.

¹⁴⁵ See MacCormick N, *Legal Right and Social Democracy*, (Clarendon Press, Oxford, 1982) at 26. Feinberg could argue that while punishment would not classify as a "harm" under his definition it would certainly be categorised as a setback to interest, but the emotive power of the term harm in our arguments would still be lost.

¹⁴⁶ Dubber MD, 'The Right to be Punished: Autonomy and its Demise in Modern Penal Thought' (1998) 16 *Law and History Review* 113 at 116. See also Dubber MD, 'The Pain of Punishment' (1996) 44 *Buffalo Law Review* 545. See also Nussbaum MC, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, (Cambridge University Press, 1986) Chapter Two: 'Aeschylus and Practical Conflict', discussing these kinds of ethical dilemmas and tragic choices.

7.3 Feinberg and Mill: equating harming with wronging

The issue to be considered in this section is why Feinberg resorted to inventing such an extended account of harm that included the concept of wrongdoing within it when he could easily have kept the two concepts separate. Feinberg does not, like Duff, equate wrongdoing with harming. He recognises the difference between the two concepts and takes care to differentiate between harm that is wrongfully brought about and harm in the everyday sense; yet still he chose to subordinate the normatively stronger concept of wrongdoing to the factual concept of harm in his account of the moral limits of the criminal law. One suspects that Feinberg took this course so that his version of the harm principle could be structured in such a way that it appears to operate analogously to John Stuart Mill's original harm principle.¹⁴⁷ Unfortunately, this tactic did not succeed because Feinberg failed to develop a complete and independent account of the concept of wrongdoing¹⁴⁸ that could fill out his understanding of criminal conduct. Instead he chose to bury an incomplete account of wrongdoing as an invasion of another's right¹⁴⁹ inside his extended concept of 'harm to others' and for this reason Feinberg's version suffers by comparison with Mill's. I attempt to solve this problem in Part IV by explaining my own understanding of the concept of wrongdoing and by examining our own criminal justice practices in order to find out whether in our western, liberal democratic communities we have given any particular content to the concept of criminal wrongdoing.

¹⁴⁷ This is partly confirmed by Feinberg's statement that his project was to determine what the word 'harm' must mean in order to preserve the truth of the liberal proposition that the prevention of harm to others is a morally legitimate purpose that justifies restrictive criminal legislation: see Feinberg, '*Harm to Others* - A Rejoinder' above footnote 6 at 17.

¹⁴⁸ Stewart notes in 'Harms Wrongs and Set-Backs' at 52 that Feinberg's analysis of wrongfulness is incomplete. See also Jean Hampton in 'Liberalism, Retribution and Criminality' in Coleman JL & Buchanan A (eds), *In Harm's Way*, (Cambridge University Press, 1994) 159 at 160. Feinberg attempts to forestall this charge in *Harm to Others* at 16-19 by arguing that we do not need to settle upon an 'ultimate' moral theory before we can settle the 'penultimate questions' as to the extent of the criminal law. However, I would argue that we do need a complete account of the *concept* of wrongdoing – even if this account is then modified by other principles or political purposes.

¹⁴⁹ A full account of wrongdoing must deal with not only with our duties to respect the rights of other individuals but also the wider duties that we owe to the community as a whole. The definition of wrongdoing as an invasion of another's *right* does not convey all that we mean by the term.

Of course Mill, as a utilitarian, did not need either to develop a separate account of wrongdoing or to worry about the distinction between harming and wronging because his understanding of wrongdoing was based directly and solely on harm (or pain).¹⁵⁰ His version of the liberal harm principle was simple – but only because he was able to make the problem of wrongdoing disappear by equating harm with wrong.¹⁵¹ For a liberal utilitarian like Mill, the only thing that counts as wrongdoing is harm-doing, and harm-doing can be forbidden only if it risks doing harm to others. Feinberg's version feels curiously back-to-front and incomplete,¹⁵² because he follows Mill's lead and structures his analysis around the idea of harm to others, but he does so without adopting Mill's prior justifying step of equating wrongdoing with harm-doing. (It certainly helps to be both a liberal and a utilitarian in these matters.) So, whereas Mill's version of the harm principle covers both the beginning and the ends

¹⁵⁰ See Mill, *On Liberty*, footnote 3, at 137. This is, of course, a vast oversimplification of Mill's philosophy: see especially his elaboration of the notions of harm, wrong and justice in his essay on 'Utilitarianism', in the same volume, 128 at 176-190.

¹⁵¹ So, Mill argued that to cause a net harm (or pain) is to do wrong, by contrast to Duff who suggests that to do wrong is to harm. Neither proposition can be supported by ordinary usage of the words and both must therefore be taken to be prescriptive interpretations rather than assertions of fact.

¹⁵² Others have expressed dissatisfaction with Feinberg's approach, but for different reasons. Jeffrie Murphy and John Kleinig worry that Feinberg neglects to develop a convincing theory of the difference between tort and crime: Murphy JG, 'Legal Moralism and Liberalism' (1995) 37 *Arizona Law Review* 73; Kleinig J, 'Criminally Harming Others' (1986) 5 *Criminal Justice Ethics* 3. See also the references in footnote 148 to Hamish Stewart (who focuses on Feinberg's incomplete account of wrongdoing) and Jean Hampton (who worries that Feinberg's liberal commitment may be inconsistent with a retributive account of our criminal justice system). Bernard Harcourt cites Jules Coleman's criticism of Feinberg's failure to base his theory of the criminal law on a prior account of the purposes of punishment, 'Joel Feinberg on Crime and Punishment: Exploring the Relationship Between *The Moral Limits on the Criminal Law* and *The Expressive Function of Punishment*' (2001) 5 *Buffalo Criminal Law Review* 145 at 154. See also Alexander L, 'The Philosophy of Criminal Law' in Coleman J & Shapiro S (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford University Press, 2002) 815 and 'Harm, Offense, and Morality' (1994) 7 *Canadian Journal of Law and Jurisprudence* 199; and Dworkin G, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927. The fact is that despite their brilliance, Feinberg's four volumes are ultimately unsatisfying for reasons that are hard to explain. The answer may lie in the fact that there is no unifying account linking the different principles and legislative aims that Feinberg develops. I attempt to develop such an account in Parts III and IV.

of the law,¹⁵³ Feinberg's version focuses on the outer limits of the criminal law (which may well be sought in the concept of harm to others), but without first investigating its beginnings (which I would argue can be found only in a richer understanding of the meaning of, though not necessarily an ethical theory of, the concepts of wrongdoing and fault and an examination of each society's criminal justice practices). The problem is that once the normative concepts are added into the definition of harm, Feinberg's version of the harm principle can no longer provide an independent (and helpfully factual) limit on our legislative (and divisively normative) decisions about the kinds of conduct that the state can legitimately criminalise, and, as I have suggested above, his formulation becomes a checklist of relevant factors rather than a true limiting principle.

Feinberg is not alone in his relative lack of attention to the issue of wrongdoing. As the twentieth century progressed, some criminal law theorists felt less and less 'entitled to the ancient certainties about human wickedness'¹⁵⁴ and the tendency to skirt around the issue of moral wrongfulness increased during this period when the general movement in western societies towards more permissive attitudes coincided with a number of developments in legal thinking, including: the influence of positivists who denied any necessary connection between law and morality; the Hart-Devlin debate over the enforcement of conventional morality by the criminal law; the dominance of the goal of rehabilitation in penal theory; the rise of the law and economics movement that interprets the morality of the law in terms of efficiency; and the more radical critical theories that emphasise the instability of language and the indeterminacy of meaning. By the end of the century, strongly pejorative terms like evil and wickedness had acquired an embarrassingly old fashioned feel and although they can still be found in our judges' comments on passing sentence and in political debates and media reports about crime and punishment, such terms have

¹⁵³ See also Kleinig J, 'Criminally Harming Others' (1986) 5 *Criminal Justice Ethics* 3 at 4 contrasting Mill's use of the harm principle (to limit any attempt to exercise control over an individual) with Feinberg's more narrow project. Duff begins 'Harms and Wrongs' at 13 by pointing out that Mill's harm principle was exclusive, whereas Feinberg's version is not. See also Epstein RA, 'The Harm Principle and How It Grew' (1995) 45 *University of Toronto Law Journal* 369; and Postema GJ, 'Collective Evils, Harms and the Law' (1987) 97 *Ethics* 414.

¹⁵⁴ See Kelly JM, *A Short History of Western Legal Thought*, (Clarendon Press, Oxford, 1992) at 389. But see Cross R, *The English Sentencing System*, (Butterworths, London, 1971) at 138-143.

almost disappeared from scholarly debates in Australia and Britain and their use has come to be seen as injecting an improperly emotive, subjective and unreliable element into academic discourse which is supposed to be characterised by a more detached, objective and logical approach.¹⁵⁵ More recently, the resurgence of interest in retributive accounts of punishment¹⁵⁶ and the rise of expressivist, moral education and communicative accounts of the criminal law¹⁵⁷ have brought the issue of the moral wrongfulness of criminal conduct back into focus and while the challenge has been taken up by those working on the legislative problem,¹⁵⁸ sentencing theorists have yet to agree on a clear role for the concept of wrongdoing in their sentencing models and the tendency has remained to relegate the issue or to disguise it, for example, by referring to the 'social harm' caused by the conduct, the 'seriousness' of the crime or the 'criminality' of the conduct rather than its moral wrongfulness. Others, like Ashworth and von Hirsch, have suggested that the seriousness of the wrong – or the

¹⁵⁵ It is illuminating to contrast the language used by Sir James Fitzjames Stephen in his *History of the Criminal Law*, (MacMillan, London, 1883) with that found in today's classic texts on criminal law and sentencing: eg, Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) and *Sentencing and Criminal Justice*, 3rd ed, (Butterworths, London, 2000); Fox RG & Freiberg A, *Sentencing: State and Federal Law in Victoria*, 2nd ed, (Oxford University Press, Melbourne, 1999). A notable exception (from the USA) is Murphy JG, 'Blackmail: A Preliminary Inquiry' (1980) 63 *The Monist* 168; Murphy JG & Hampton J, *Mercy and Forgiveness*, (Cambridge University Press, 1988). For an extensive discussion of the use of the metaphors of filth and slime in debates over the criminal law in the USA see Duncan MG, 'In Slime and Darkness: The Metaphor of Filth in Criminal Justice' (1994) 68 *Tulane Law Review* 725.

¹⁵⁶ See for example, von Hirsch A, *Past or Future Crimes*, (Manchester University Press, 1985); *Censure and Sanctions*, (Clarendon Press, Oxford, 1993).

¹⁵⁷ Curiously, Feinberg's essay 'The Expressive Function of Punishment' in *Doing and Deserving: Essays in the Theory of Responsibility*, (Princeton University Press, 1970) at 95 was at the forefront of this 'expressivist' movement, a fact noted by Bernard Harcourt in 'Joel Feinberg on Crime and Punishment: Exploring the Relationship Between *The Moral Limits on the Criminal Law* and *The Expressive Function of Punishment*' (2001) 5 *Buffalo Criminal Law Review* 145. Jean Hampton developed the moral education approach to punishment, see discussion in section 6.3 of Chapter Six; and Antony Duff has championed the communicative approach, most recently in *Punishment, Communication and Community*, (Oxford University Press, 2001).

¹⁵⁸ For example, George Fletcher and Michael Moore in section 6.5 above. See also Andrew Ashworth in *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 42-46; and the references cited in footnote 130 in Chapter Three.

crime – is a function of the harm caused or risked by the crime and the offender's personal culpability,¹⁵⁹ but, like John Gardner and Stuart Green,¹⁶⁰ I argue that we cannot reduce wrongdoing to these two components and that we must find a separate role for the concept of wrongdoing in our model of the sentencing decision.

Given that the normative concept of crime itself contains a strong connotation of wrongdoing,¹⁶¹ we would normally expect an account of the moral limits of the criminal law to give prime place to the concept of wrongdoing, and in fact most non-utilitarian liberals¹⁶² do treat the issue of harm to others as part of the secondary test that justifies placing a limit on the kinds of wrongdoing that can be criminalised by the state.¹⁶³ So, while harm to others may provide a limit on the state's jurisdiction, the primary issue is the question of wrongfulness. However, because Feinberg subordinates the more important concepts of wrongdoing and fault to the issue of harm, his account is structured in reverse and these normative concepts appear to function instead as limits on the kinds of conduct that we can properly call 'harm to

¹⁵⁹ See references in footnote 35 in section 1.3 in Chapter One.

¹⁶⁰ See Gardner J, 'Crime: In Proportion and in Perspective' in Ashworth A & Wasik M (eds), *Fundamentals of Sentencing Theory*, (Clarendon Press, Oxford, 1998) 31 at 47 (wrongful action, and blameworthiness); Green SP, 'Why it's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 43 *Emory Law Journal* 1533 at 1547 (culpability, social harmfulness, moral wrongfulness); and the view expressed by the Supreme Court of Canada in *M.(C.A.)* [1996] 1 SCR 500, 105 CCC (3rd) 327 at 368-369, per Lamer CJC, (moral culpability, consequential harm, and normative character of the offender's conduct).

¹⁶¹ See discussion in section 5.2 of Chapter Five.

¹⁶² See, for example, Moore, *Placing Blame*, above footnote 74 in Part III, where he discusses the aims and limits of criminal legislation; and Hamish Stewart 'Book Review' above footnote 130 at 412: 'it is wrong not harm that determines what is criminal'. See also McCormick N, *Legal Right and Social Democracy* (Clarendon Press, Oxford, 1982) at 33: 'the harm principle does directly contemplate the (supposedly) immoral quality of harmful acts.'; and Dworkin G, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927. For a critical discussion of Moore's approach, see Finkelstein C, 'Positivism and the Notion of an Offence' (2000) 88 *California Law Review* 335 at 371-379. Bernard Harcourt has argued that claims of harm have become so pervasive that the harm principle 'no longer serves the function of a critical principle' in our debates: see 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109 at 113, original emphasis.

¹⁶³ It may be this aspect of Feinberg's work that lies behind Duff's complaint that Feinberg should not first have defined harm in a broad sense and then moved to consider wrongfully caused harms.

others' and which can therefore justly be criminalised.¹⁶⁴ As a result Feinberg has understated the role of wrongfulness, has overloaded the concept of harm, and produced an account that appears not only to be oddly fitted to his task but is unsuited to any other.

In a similar fashion, Mill, who equated harming with wronging, and Duff, who has argued that we cannot separate wronging from harming, have provided prescriptive accounts of the way that we should interpret conduct that ought to be forbidden by the criminal law, which fail at a descriptive level. Because the approach taken by Mill and Duff either reduces one of the key concepts to the other or maintains that we cannot separate one from the other, neither one can offer an interpretation that can be of use in sentencing. If we keep harm and wrongdoing as two categories, but define one in terms of the other, we risk double counting one factor. If we have only one extended category of 'harm' (which is wrong) or 'wrong' (which is harm) that hides the other from view we risk missing one out altogether or confusing the role that each should play in the sentencing decision. Furthermore, if we equate the two we lose the opportunity to use one concept to justify imposing a principled control over the other: if they are the same thing (or unseparable things), neither one can take priority. Feinberg's model, which on one level correctly maintains the difference between the three concepts of harm, fault and wrongdoing, represents an improvement on the accounts given by Mill and Duff, but because it reverses the priority that the normative concept of wrongdoing ought to have over the factual concept of harm within the meaning of the concept of a crime, it too offers an account that is unsuited both to the legislative and the sentencing tasks.

7.4 Relating the separate concepts of harm and wrongdoing

The fact that the accounts of harm and wrongdoing produced by Feinberg, Duff and Mill are not suited to sentencing is not necessarily surprising. These philosophers were not discussing sentencing issues but were inquiring instead into the nature and meaning of the concept of crime and the proper limits on the state's legislative powers, and to answer these kinds of normative questions it is necessary to find a way

¹⁶⁴ So, we can contrast Mill's views (if conduct is not harmful it is not wrongful; and if it is not harmful *to others* it cannot be forbidden by the criminal law) with Feinberg's (if conduct is not wrongful it cannot count as harm to others, and so it cannot be forbidden by the criminal law).

to relate the three aspects of harm and wrongdoing and fault. What is surprising, however, is the fact that none of the attempts either to equate harming and wronging or to define harm in terms of wrongdoing and fault appears to offer a comprehensive solution to the legislative problem that these philosophers were trying to solve. Feinberg, for example, decided that the harm principle (even in its extended normative sense) was not enough to cover all of the conduct that he thought could legitimately be prohibited by the criminal law. Consequently, he supplemented the harm principle with the 'offence principle' and he also concluded that liberals could support legislation against conduct which was not covered by either the harm principle or the offence principle but which produced a third kind of negative effect which he labelled 'non-grievance evils'.¹⁶⁵ However, although Feinberg's list identifies and classifies a wide range of conduct that we do not like¹⁶⁶ and gives reasons why we might want to criminalise it, his resulting 'taxonomy of legislative aims'¹⁶⁷ is not united by any principle or account of the criminal law that can link those different aims and it does not produce anything like John Stuart Mill's single legislative principle that might resolve our debates over the extent of the criminal law.

I suggest that Feinberg's failure to develop a comprehensive model based on harm is linked with his failure to develop a full account of the normative concept of wrongdoing and to recognise its priority of place in the criminal law. I will argue in this section that if the differences between harm and wrongdoing are properly identified it is possible to go part of the way towards resolving not only the legislative but also the sentencing problems associated with these two concepts. By recognising the essentially different roles that these essentially distinct and independent concepts can play, we can begin to develop a congruent account of the decision making model which not only uses the same definitions at both the legislative and the sentencing stages of the criminal justice process but which can at the same time properly allocate

¹⁶⁵ On the issue of the 'offence principle' see *Offense to Others*, and on the issue of free-floating or non-grievance evils, see *Harmless Wrongdoing* at 17-33, 126, and 323. For a powerful critique of Feinberg's approach to the issue of offence to others see von Hirsch A, 'The Offense Principle in Criminal Law: Affront to Sensibility or Wrongdoing?' (2000) 11 *Kings College Law Journal* 78 and Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269.

¹⁶⁶ Simester & von Hirsch argue that the claim that 'we do not like it' is not a sufficient justification for criminalising offence in 'Rethinking the Offense Principle' above footnote 165 at 274-275.

¹⁶⁷ See Moore, *Placing Blame* above footnote 74 at 642-652, especially Figure 16.1 at 648.

the policy role to legislators¹⁶⁸ and relieve judges from having to adhere to any particular theory of ethical value or to adopt a particular controlling purpose of punishment like deterrence or retribution. This section will show that the strengths of each of the concepts of harm and wrongdoing can compensate for the problems posed by the other, and will argue that they can be seen as forming a complementary functional pair that can help to structure both our legislative and our sentencing decisions. In Part IV I will expand upon this interpretation of the role that these concepts can play in structuring and justifying the decisions that we must make within the criminal justice process. I will explain the additional role that the normative concept of fault can play in modifying our responses to wrongful conduct in order to complete the construction of a model that is based on the priority of the normative over the factual in the criminal law. So, while the final sections of Part II will look at the ways that the two concepts of harm and wrongdoing can complement each other in functional terms, simply as concepts, Part IV of the thesis will attempt to identify the principles and values that account for the actual form, content and roles given to these concepts by our current criminal law. This will not only allow us to understand the functions that the concepts of harm, wrongdoing and fault can serve in the criminal law but will also allow us to see into the deeper normative or moral heart of our criminal justice practices so that we can construct a single model of our current criminal law that can justify the decisions that we must make at each one of the three critical stages of legislation, conviction and punishment.

The reason why these three philosophers developed accounts which link or equate the two concepts of harm and wrongdoing is not simply because neither of the two concepts on their own can account for the nature of the criminal law as it currently exists,¹⁶⁹ but also because the primary concept of crime, like the concept of wrongdoing, is essentially an open or content-neutral concept.¹⁷⁰ Despite the valiant efforts of commentators like Hall, Hampton and Kleinig to find a sense of harm that can provide the necessary litmus test, the ordinary meanings of the two concepts of wrongdoing and crime do not, however, point to any factual test that can help us to

¹⁶⁸ Robinson PH, 'One Perspective on Sentencing Reform in the United States' (1997) 8 *Criminal Law Forum* 1 at 12 suggests that we need to 'take the judge out of the sentencing policy business'.

¹⁶⁹ See Moore, *Placing Blame* above footnote 74 at 649.

¹⁷⁰ See section 3.4 of Chapter Three.

identify the content of the criminal law or to place a limit on the kinds of conduct that the state can properly criminalise. The guidance that they do contain directs us to consider only the fact of our own moral opinions and the guiding values that give us our reasons for those opinions, and so it is at the point of legislation, where we must decide that the rule forbidding a particular kind of conduct is right, that the concept of wrongdoing poses its greatest challenge. This is because we disagree over matters of underlying ethical theory. Furthermore, the divisions between those adopting a deontological account of ethical value (including divine-command views, the Kantian rationalist approach, and the contractarian / rationalist views of Plato or Rawls); those following Aristotle's theory of virtue ethics; or the many different teleological theories (including perfectionism and the three varieties of consequentialism - egoism, utilitarianism and altruism) suggest that we are not likely ever to agree on a theory of ethics that will tell us how to decide what is wrong and what is right. Because we cannot afford to wait until we agree on a theory that can resolve these divisive normative issues, and because our opinions differ and change over time, we have been forced not only to adopt a case by case approach to legislating the criminal law but we have also tended to resort to the 'harm principle' as a helpfully factual limit on those legislative decisions.¹⁷¹

There are two reasons that may initially justify the choice of 'harm to others' as a useful and principled limit on the extent of the state's responses to wrongdoing; one is practical (or functional) and relates to the ordinary meaning of harm, and the other is theoretical and is related to the functions and role of the state.¹⁷² The practical reason

¹⁷¹ Of course, utilitarians see harm-doing as the key to wrongdoing and so harm provides both the definition of wrongdoing and the limits on the criminal law at the same time. Bernard Harcourt has argued that the harm principle can no longer act as a limiting principle because conservatives have adopted harm based arguments in support of offences traditionally considered to be moral offences (like prostitution, pornography, drug taking, public drinking, loitering, and homosexual sexual conduct) which could be justified only under the offence principle: see 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109 at 115-116, 139, and 183. Andrew von Hirsch discusses these 'remote harms' in 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996) 259. See also Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 51-52. I will discuss these issues further in Chapter Eleven.

¹⁷² Neither of these two reasons is enough to explain fully our current criminal law, but I will return to this issue in much greater detail in Part IV. At this point I want only to explain *how* the two

exploits the factual nature of the concept of harm: by contrast with the case of wrongdoing, the answers to questions about harm can be more easily established because the evidence that leads us to these answers lies not in normative opinions but in ascertainable facts. By using a qualitatively different concept to break the deadlock over these normative decisions, we may be able to increase our chances of coming to agreement.¹⁷³ A limit that is based on the relatively straightforward issue of harm may therefore offer the added advantage of reducing the levels of hostility and confrontation in the debates over these divisive moral issues because such a limit can rule out many of the most highly contentious cases on factual rather than normative grounds. So, for example, if it is agreed that consensual homosexual intercourse or possession of small amounts of recreational drugs for personal use is not relevantly harmful to others, a debate over whether the state can legitimately forbid such conduct under the criminal law can be resolved in a legislature that accepts harm to others as a limiting principle without the need to come to agreement over whether the conduct is relevantly wrongful.¹⁷⁴

The essential difference between harm and wrongdoing allows us to link these two negative, but qualitatively different, concepts in such a way that the factual strength of the concept of harm can help to resolve the difficulties created by the openness of the normative concept of wrongdoing. However, if the test of harm to others is to serve as an effective limit on these difficult legislative decisions, we must restrict our use of the term to its ordinary factual sense and consider only the negative effects of the conduct that makes others in the community worse off in some way. For once we abandon the factual sense and adopt any of the extended normative definitions of harm that includes an assessment of the moral quality of the conduct or the culpability of the actor, we will be returned to the very moral disagreements that divided us in the first place, and, as I have argued in the previous section, the concept of harm to others would no longer offer any solution to the problem of limiting our legislation against wrongdoing.

concepts might be fitted together. I will provide an argument that justifies *why* they should be fitted together in Chapter Nine and in Part IV.

¹⁷³ But see discussion in footnote 41 in section 1.3 in Chapter One.

¹⁷⁴ I will explain why I think that we are justified in adopting the harm to others principle and supplementing it with a second, normative, principle in Part IV.

The second reason pointing towards ‘harm to others’ as part¹⁷⁵ of the solution to the legislative dilemma is one of principle: the issue of forbidding the doing of harm *to others* is related directly to the state’s function of maintaining the conditions under which each individual can live harmoniously together *with others* as a community. In this case our political agreement over the purpose for the existence of the state offers an alternative source of principled limits over the state’s legislative decisions that does not first require us to come to agreement upon any particular theory of ethical value or any particular philosophical purpose of punishment. The harm to others principle therefore offers one example of how we can find a way around the things that we are doomed to disagree upon by focusing on the things that unite us, and these sources of agreement include not only our existing political consensus as to the nature and functions of the state (which is in turn based on our common nature as physical and social beings who need to live together in groups) but also our shared culture of value, our shared language and our shared understanding of the ordinary meaning of the terms crime, harm and wrongdoing. I will explore this insight further in the following Parts where I will suggest that we need to supplement the factual ‘harm to others’ principle with a normative ‘respect for others’ principle so that we can understand both the factual and the normative dimensions of a crime. In Part IV, I will argue that together these two principles make up a complementary picture of our community’s conception of criminal wrongs that can fill out our understanding of the links between the three aspects of wrongdoing, harm and fault and will help us to construct a model of the criminal justice decision making process that is based on a coherent account of the role that the criminal law should play within our political community in securing the conditions under which we can live a good life together.

7.5 Extending the relation: from legislative limits to sentencing limits

The problems that occur in the sentencing phase of the criminal justice system mirror the problems that occur in the legislative stage. However, while the source of the problems is reversed and the difficulty lies in limiting the tracking of harm and not in the matter of wrongdoing, the solution to the problems remains the same. There are

¹⁷⁵ Other principles such as the ‘*de minimis* principle’ also come into play, see Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 35-37. I will explain why I think that we need a second principle based on ‘respect for others’ in Parts III and IV of the thesis.

two kinds of questions about harm that we have to answer when sentencing an offender: the first is factual, the second is normative, and the answers to both require us to bear in mind not only the different nature of the concepts of harm and wrongdoing but also the priority that the criminal law accords to them. The initial sentencing inquiry into harm is a factual one and the ordinary meaning of the word directs us to our answer: when we must decide whether an offence has caused any harm we simply ask whether it has made anyone or anything worse off. At this stage, as in the legislative stage, only the factual sense of harm that restricts the inquiry to the effects of the conduct can provide a clear and useful answer.¹⁷⁶ Any extended definition that includes the normative aspects of wrongdoing or fault would extend the inquiry too far and could lead to double counting in a model that takes harm, wrongdoing and fault into account as separate aspects of the seriousness of a crime.

The second sentencing inquiry into harm is not a factual inquiry directed at the existence of harm, but a normative or moral one that inquires into the problem of the remoteness of harm and the legitimacy of our responses to the offender and the crime. This second question asks whether it would be right to take into account when sentencing the offender, all of the harm that we have identified as flowing from the offence. The problem is that although harm is relatively easy to identify and track, the negative effects of any given offence can theoretically continue forever. Furthermore, the harmful effects of a crime do not flow only from the offender to the victim, but can ripple out in all directions and affect the life of the offender as well as the lives of both the offender's and the victim's families, friends, employers, and indeed, the whole community. This means that once we turn to the sentencing phase, it is harm, and not wrongdoing, that is unconfined and it is because harmful conduct can give rise to such multi-dimensional effects that we need to find a principled limit that will control the extent to which the state can track the harm done by an offender.

Given that crime itself has a primary connotation of wrongdoing and that the process which leads us to criminalise conduct requires us to consider a series of normative decisions about right and wrong,¹⁷⁷ the most important of which relates to the social meaning of the conduct as a deviation from a rule or norm of conduct thought to be right, it follows, simply as a matter of meaning, that this normative

¹⁷⁶ See my discussion and conclusions in section 2.3 of Chapter Two.

¹⁷⁷ See section 5.2 in Chapter Five.

aspect should take priority over the factual aspect of harm when we consider the issue of remoteness. Ample evidence of the relative strength of the normative over the factual in the criminal law can be found in the tendency of philosophers to slip irresistibly in their accounts of the special 'harm' done by crime into characterisations either of the social meaning of the conduct (as an attack, a violation, an invasion, or a repudiation of the values of a community) or of the offender's culpable intentions, attitudes, or socially unstable character traits. Furthermore, since the issue of remoteness of harm is itself a normative question, it cannot be resolved simply by reference to the meaning of the factual concept of harm. I suggest that we can begin to justify a limit on our decisions about the relevance of harm to sentencing by recognising the priority given to the concept of wrongdoing within the meaning of our concept of a crime. Just as the factual concept of harm can provide a limit on the normative issue of wrongdoing in the legislative phase, so too can the normative concept of wrongdoing provide a limit on the tracking of harm in the sentencing phase, and in each case the solution is found, first in identifying the difference between the two concepts of harm and wrongdoing, then in recognising the nature of the concept of a crime, and finally by relating those concepts to the reason for the existence of the state.

This source of the sentencing limit can be justified, just as the previous legislative limit was justified, not only on theoretical grounds relating to the priority of the normative over the factual in the criminal law, but also on practical grounds based on our understanding of the meaning of the concept of wrongdoing and our appreciation of the essential difference between the concepts of wrongdoing and harm. In a practical sense, the concept of wrongdoing does not pose many problems at the sentencing stage as there is no controversy over the relevance of the offender's conduct to the sentence. Furthermore, the problems associated with wrongdoing disappear once the legislators have made their decision: the concept is no longer open because the legislative decision gives it legal substance and defines its content; and once an offender has committed an offence, the conduct itself can generally be isolated in time and space fairly easily. As I explained in section 3.2 of Chapter Three, once the legislature has laid down a particular law it then becomes possible to identify, as a matter of practical interpretation, the immediate factual purpose or protected object of the law and the values that justify protecting that particular object and criminalising that kind of conduct. This feature of the meaning of the concept of

wrongdoing therefore allows our sentencing judges to follow the approach taken at the legislative phase and to adopt a case by case method for determining the sentence that does not require them to first agree on a particular theory or an over-arching purpose of punishment that will control their decision.

Instead, the sentencing judge can use the particular purpose of each individual law to control the tracking of the harm that flows from any given breach and can arrive at an evaluation of the seriousness of the crime by reference to the community values that underpin that purpose. So, for example, in a case of murder, the judge should consider only the harm that is covered by the immediate defined purpose or object of declaring murder to be a legal wrong. If we were to identify this purpose as protecting the life and the physical integrity of the victim, it would follow that only the injuries, trauma, pain and the manner of death of the victim should count towards the sentence, and any consequential emotional and economic harm done to the families of both the victim and the offender should be excluded from consideration. I will return to this point in Chapter Twelve which will present a complete version of my remoteness test, which will also include a subsidiary role for the other important normative concept of fault (which, I will argue, can be used in some cases to justify expanding the categories of harm that are to be taken into account when sentencing an offender).

Using the concept of wrongdoing as the source of the remoteness test for sentencing therefore offers both a practical and principled solution to the problem posed by the concept of harm that does not first require our judges to develop a master theory of ethical value or to manufacture a hybrid compromise between theories. Neither need they adopt a smorgasbord or even a hierarchy of the purposes of punishment. If we can identify the individual, factual purpose behind each specific law, then we do not need to find a larger purpose of punishment to control the extent to which we can take the consequential harm done by the crime into account when sentencing the offender, and the particular values that lie behind these purposes can guide the judge in evaluating the overall seriousness of that crime and the quantum of punishment. This approach has the added advantage of leaving the policy decisions with the legislature, and allowing the judges to continue in their usual task of interpreting our laws as they find them and evaluating each case based on their understanding of the shared values that underpin and justify the objects of our existing criminal laws as they discern them.

The assumption that there is a 'set of shared values' behind our criminal laws has been attacked by Peter Alldridge.¹⁷⁸ I will argue in Parts III and IV that there are at least some universally approved values (namely, welfare, autonomy and being respected by others as an equal) that do support our criminal laws. However, whether this is true or not, the fact remains that it is possible for sentencing judges to find guidance for sentencing in the values that they can in fact discern within any given criminal law (or set of criminal laws), regardless of whether those values are shared by all in the community or have been imposed by legislators. Certainly, if any law is based on values that are not shared by the community, that might be an indication that the law is in need of reform, but this is not necessarily a problem for sentencing judges who are obliged to respond in the name of the state to the laws of the state. In those cases, however, if the community no longer shares the values or if the relative importance given to those values has changed, that fact may allow the judge in a case where the law has yet to be reformed, to impose a lesser punishment than might have been imposed in earlier times.¹⁷⁹

Even though we do not agree on matters of theory, the case by case approach is possible because we do agree as a matter of fact on many (possibly most) of the specific examples of the conduct that should be forbidden by the core of the criminal law (eg, murder, rape, robbery, etc) and, *pace* Alldridge, we do share the ability to discern the values that underpin those objects. This means that, if each crime has been agreed upon by the community's representatives, is capable of precise definition, and has a identifiable factual (if not a theoretical) purpose or object which itself is justified because it contributes to maintaining the essential conditions under which we can live a good life together with others in a community, then our judges do not need to identify an overriding theoretical purpose of or theory of punishment. All they need, in order to develop a comprehensive, coherent and workable sentencing model, is to use their everyday understanding of the three separate concepts of harm, wrong and fault and to combine this understanding with their perceptions of the community values that account for the specific aims of each of their community's criminal laws.

¹⁷⁸ Alldridge P, 'Making Criminal Law Known' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 103 at 108-111.

¹⁷⁹ See, eg, the cases of 'indecent practices between male persons' where the sentencing standards and community views have changed. But see *MJR* [2002] NSWCCA 129; (2002) 130 A Crim R 481.

7.6 Conclusion to Part II: ending the struggle¹⁸⁰

I have argued in this Part of the thesis that we should reject the accounts of harm developed by legal philosophers who have incorporated the aspects of fault or wrongdoing within their extended normative definitions. I have also argued that there is no special kind of harm associated with criminal conduct that can provide us either with a limit on the kinds of harmful conduct that can be forbidden by the criminal law or with a limit on the kinds of harm that should be taken into account when sentencing. Consequently, I suggest that we should end the struggle over the meaning of harm and adopt a definition that reflects the everyday understanding of harm as the adverse effect of an event that has made someone or something worse off. This definition emphasises the essentially factual nature of the concept of harm and allows us to see clearly the difference between the factual consequences of an event and the two normative aspects of wrongdoing and fault which we refer to when we are assessing the moral nature of human conduct and considering our responses to it.

The analysis of these philosophical accounts of harm and the moral limits of the criminal law has also confirmed that the three aspects that preoccupy us when we think about criminal conduct are the nature of the conduct itself as a deviation from a norm thought to be right, the individual responses of the person whose conduct it is, and the actual effects of that conduct in the world. This suggests that we need to adjust our understanding of the relevant components of the seriousness of a crime to take account of each of these three different aspects of wrongdoing, harm and fault when sentencing offenders for their crimes. I demonstrated in Part I that these three aspects are separate, independent concepts that do not need to be defined in terms of the others and I have sought to show in this Part that it would be a mistake to include any composite definitions of these three concepts within our already composite conception of a crime itself. Accordingly, in the remainder of this thesis I will use the following definitions of these three key terms:

Wrongdoing (a normative concept):

Wrongdoing is conduct (either an act or an omission) that deviates from a rule, norm or standard of conduct thought to be right.

¹⁸⁰ Bernard Harcourt in 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109 at 117, discusses the struggle between progressive liberals and conservatives over the meaning and relevance of harm.

Harm (a factual concept):

Harm is the adverse effect of an event that makes someone or something worse off than they were before the event.

Note: in the sentencing context harm would refer to the adverse effect of an offender's criminal conduct that makes someone or something worse off than they were before the event of the crime.

Fault (a normative concept):

A person is at fault if their individual responses to their circumstances are not as they should be (ie, if their responses deviate from those that are thought to be right). A person's responses may be manifest in conduct, attitudes or intentions.

By focusing on the meaning of the concepts of harm and wrongdoing, their separate nature, and their different strengths and weaknesses, Part II has revealed the complementary role that each may play in structuring and limiting our decisions at both the legislative and the sentencing stages of the criminal justice process. Liberals have suggested that at the legislative stage, the extent of our decisions to criminalise wrongful conduct could be limited by the factual 'harm to others' principle. I have suggested that at the sentencing stage, our responses to the factual harm done by the crime can be limited by the normative 'scope of the wrong' principle, and in Chapters Eleven and Twelve I will expand upon this suggestion by considering in more detail the way that the concept of fault can supplement these principles.¹⁸¹ The analysis of the accounts given by the philosophers who have grappled with the concepts of harm, fault and wrongdoing as a source of moral limits on the criminal law has confirmed the extent to which our response to any given conduct depends on the community values that underpin our vision of a good life in a good community. These values help to explain the choices that we have made as to the content and structure of our criminal law and in the second half of this thesis I will show how these values can be used to help us to identify and evaluate the relative importance of the role that each of these three key aspects of a crime plays within our criminal justice processes and to guide us in our evaluation of the seriousness of crimes.

Part II has also shown how we might avoid having to settle upon a master theory of ethics or a controlling purpose of punishment to guide our sentencing decisions

¹⁸¹ In Chapters Eleven and Twelve, I explain how the aspect of fault moderates our decisions at the trial / verdict stage by limiting the extent to which we hold individuals to be responsible for their conduct, and by extending the categories of harm that can be taken into account at sentencing.

because we can structure our decisions around the key concepts of harm, wrongdoing and fault, and follow the lead of the legislators and adopt a case by case approach to evaluating our legal responses to any particular conduct. Given that each law must have an identifiable factual (rather than a theoretical) purpose or object, I have suggested that this purpose can be used by our judges to limit the extent to which the harm caused by an offender can be taken into account when sentencing and I have argued that the values that led our legislators to criminalise the conduct can be used to guide our evaluations of the seriousness of the crime and the quantum of punishment that should be imposed on the offender.

In Chapter Five I argued that the normative notion of a crime gives priority of meaning to the normative aspect of wrongdoing. In Chapter Eleven I will explore this issue further by analysing a wider range of decisions that have been made at each of the three stages of legislation, verdict and sentence. I will attempt to account for the outcomes of those decisions by linking the concepts of harm, wrongdoing, and fault with the guiding values of welfare, autonomy and equal respect. This analysis will show that the priority of meaning identified in Part II is reflected in the priority of value which our criminal justice practices have allocated to the normative aspects of a crime over the factual aspect of harm. In Part IV, I will show how these two streams of argument can justify the construction of a model which gives primacy to the normative concepts of wrongdoing and fault over the factual aspect of harm at each of the stages of legislation, conviction and sentencing and which at the same time is built not only upon the language and the concepts that we share, but is also based upon our shared nature as human beings, our mutual need to live in social groups, and the values that dominate both the lives that we share and the laws that are aimed at securing the conditions under which we can live a good life together.

PART III

IDENTIFYING HARM AND THE ELEMENTS OF THE GOOD LIFE

Chapter 8 Examining the Good Life

- 8.1 From definition to identification
- 8.2 From identification to evaluation
- 8.3 Examining the good life

Chapter 9 Giving Content to the Categories: Identifying Harm, Wrongdoing and Fault

- 9.1 Introduction
- 9.2 Welfare and the concept of harm
- 9.3 Autonomy and the concept of harm
- 9.4 Respect and the normative dimension of the good life
- 9.5 Making connections: crime and the good life
- 9.6 Conclusion to Part III: supplementing the harm principle

Chapter Eight

Examining The Good Life

8.1 From definition to identification

In the previous chapter I argued that the best way to end the struggle over the meaning of harm is to reject the extended normative accounts that incorporate any elements of culpability and wrongfulness and to adopt instead a definition that reflects the everyday understanding of harm as the adverse effect of an event that has made someone or something worse off. Apart from conferring the benefits of simplicity, clarity and easy communication by eliminating the use of inscrutable private definitions of harm, the use of this ordinary definition as a tool offers the added advantage of sharpening the distinction between the factual nature of the harm caused by a crime and the normative nature of the two aspects of wrongdoing and fault. I also concluded in Chapter Seven that, taken together, the three separate concepts of harm, wrongdoing and fault appear to capture the most important aspects that we wish to respond to in a crime and suggested that it is essential that we recognise both the differences between them and the relative importance of the role that each one plays in the criminal law before we can develop a comprehensive model which can properly structure our decisions about the content and borders of the criminal law, assist us in evaluating the seriousness of criminal offences and provide us with principled limits on the extent of the state's responses to those who have committed them.

Settling upon a definition of harm takes us only part of the way towards determining its role in the criminal law and its relevance to an offender's sentence. The next step is to give factual content to the concept by applying the definition to actual cases and identifying which of the various kinds of negative consequences that may flow from any given offence are to count as being harmful. Before we can apply the harm principle in our legislatures, and before we can take harm into account when sentencing an offender, we must know how to recognise harm when we see it. Fortunately, the test to be applied is contained within the definition: it is only when an adverse effect has made someone or something worse off that we can classify it as a harm. Not every negative consequence is necessarily harmful and one of the aims of

Part III is to find out what kinds of effects are to be accepted as harms and to identify which of the interests that the criminal law protects are associated with those harms. Some of the subsidiary issues that will also be considered include: whether causing a response of offence, insult, disgust, resentment, humiliation or emotional distress to others is to be recognised as causing harm; whether pain is a harm; whether having one's interest in autonomy infringed, being treated with disrespect, or simply being touched against one's will is to count as being harmed; and whether rights violations are themselves harms.

8.2 From identification to evaluation

Solving the problem of identifying the different categories of harm leads inevitably to the problem of evaluation, and evaluating harm in the context of the criminal law poses two different challenges. The most straightforward challenge arises from the fact that harm is not a simple 'all or nothing' concept but is always a matter of degree.¹ This means that we must not only find a way to evaluate the extent of the harm that flows from any given event but we must also consider how to compare the different categories within the three classes of harm and make judgements about their relative importance.² This 'factual-evaluative' challenge can be contrasted with much deeper and more controversial 'normative-evaluative' challenge,³ which occurs when we must decide how to respond to conduct that threatens to cause harm. When a community decides to give legal recognition to the individual and community interests that it deems to be worthy of protection, and takes the further step of imposing criminal sanctions on those whose conduct is thought to constitute a blameworthy attack upon those interests, a different kind of evaluation is required.

At the point when the community must decide how far it is prepared to go in responding to wrongful conduct that threatens these special interests, it must find a way to decide not only what is to count as harmful, but also what is to count as blameworthy wrongdoing and what is to count as a principled response to that wrongdoing. Unless the community adopts a utilitarian harm-based theory of ethical value, these legislative decisions require an evaluation of a range of normative issues

¹ See sections 2.1 and 2.2 of Chapter Two.

² Section 2.2 of Chapter Two explains how harmful events can make us worse off in respect of our actual states of existence, our legitimate expectations, or our competitive position relative to others.

that go beyond the question of harm and point up the urgency of weighing the relative importance of the role that is to be allocated to the factual issue of harm as opposed to the roles to be played by the normative issues of wrongdoing and fault.

The challenge of determining the relative priority of value allocated to the different aspects of a crime will occupy the later chapters of this thesis as it moves from the initial question of identifying instances of harm in Part III to the deeper issue of evaluating the importance of the role that harm plays in the criminal law in Part IV. So, by contrast with the first half of this thesis, which focused on definitions and the priority of place given to the concept of wrongdoing over harm within the *meaning* of the concept of a crime, the second half of this thesis will attempt to identify the priority of *value* that the community has given to each of the key concepts of wrongdoing, harm and fault within the criminal law itself so that it will be possible to construct a model of the criminal justice decision making process that offers a principled approach to punishment and the problem of harm.

All three of these fundamental challenges – to identify factual instances of harm, to identify acceptable criteria for defining criminal wrongdoing, and to decide what to do in response to conduct that is deemed to be harmful and/or wrongful – require us to have a prior conception of the constituent elements of a good life in a good community and to have some sense of the relative value placed on those elements. Before we can respond to harm and decide on the way to tackle both the things that are bad for us and the things that are bad to do, we need to have an understanding of what is good for us and what is good to do.⁴ As Albin Eser, Neil MacCormick and

³ Section 2.4 of Chapter Two distinguishes ‘factual-evaluative’ from ‘normative-evaluative’ issues.

⁴ Donald Brown, *Human Universals*, (Temple University Press, Philadelphia, 1991) points out at 131-134 that all human languages display a number of fundamental binary oppositions (like wide and narrow, good and bad, right and wrong, etc) which could theoretically be expressed in three ways, eg: (1) ‘good’ and ‘bad’; or (2) ‘good’ and ‘not good’; or (3) ‘bad’ and ‘not bad’. He points out that the third alternative is never the obligatory or common way of speaking. The consequence is that we are never forced to express these positive concepts as a ‘negated versions of their opposites’. See also ‘Crime and the Concept of Harm’ (1978) 15 *American Philosophical Quarterly* 27 at 30-31, where John Kleinig argues that the notion of welfare ‘is of central importance for an understanding of harm.’ Kleinig draws upon GH von Wright’s discussion of the distinction between ‘privative’ concepts (a privative concept is ‘one whose opposite is logically primary’) and ‘positive’ concepts in *The Varieties of Goodness*, (The Humanities Press, New York, 1963) at 54-65 (n.v.) and Feinberg discusses the same point in *Harm to Self*, (Oxford University Press, 1986) at 112.

many others have pointed out, the formal legal recognition of the factual interests protected by the criminal law takes place against a backdrop of pre-existing, generally conceived moral and political values, which, ideally, should be ordered into a coherent scheme and applied in a consistent and principled manner.⁵ By contrast, HLA Hart, who relied on a single, but different, justifying value at each different stage of the criminal justice system, argued that it is a mistake to attempt to answer the two separate questions as to the general justifying aim of punishment and its proper distribution by reference to a single principle or theory.⁶ Nicola Lacey maintains that our criminal justice practices pursue and respect a plurality of fundamental community goals and values at all stages,⁷ and I have suggested that these practices are not only characterised by a plurality of values, but are also marked out by choice, because choices must be made when values conflict and decisions must be re-evaluated as the community's values change and our perceptions of the relevant

⁵ Albin Eser in 'The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests' (1965) 4 *Duquesne University Law Review* 345 at 413 defines a legal interest worthy of protection by the criminal law as 'any factual interest or good of an individual, of a social group, or of the state, if it is socially recognised and in harmony with the spirit and value order as established by the Constitution.' Neil MacCormick argues in *Legal Right and Social Democracy*, (Clarendon Press, Oxford, 1982) at 27-32 that the criminal law and acts of state punishment are parasitic upon an established legal order of rights and duties, a conception of a just ordering of society, and a coherent scheme of values. Joel Feinberg cited MacCormick's point with approval in *Harmless Wrongdoing*, (Oxford University Press, 1988) at 11-12. See also the suggestion in Kahan DM, 'The Secret Ambition of Deterrence' (1999) 113 *Harvard Law Review* 413 at 421 that criminal punishment 'conveys an authoritative schedule of moral values'; and Marshall SE & Duff RA, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7 at 19 who suggest that crime is 'an attack on the group – on their shared values and their common good.' See also the reference to Nicola Lacey in footnote 7 below.

⁶ Hart HLA, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) at 4. Hart suggested (at 6-7) that relying on the harm based principle of deterrence when deciding the content of 'the primary laws setting standards for behaviour' was not inconsistent with adopting a limiting principle of retribution as the controlling value when determining the content of the 'secondary laws specifying what officials must or may do when they are broken.'

⁷ Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 186-189. Lacey suggests at 117-118 that every political society must work out a 'coherent ordering of its values' but argues at 188 and 199 that there should be no fixed or rigid priority between those values. At 185 Lacey contrasts her goal of 'consistent pluralism' with HLA Hart's approach.

conceptual categories and factual distinctions develop over time.⁸ This feature of our legal practice can be illustrated by the history of our responses to the values of liberty, equality and the idea of equal treatment before the law. Despite the fact that our initial intellectual and political commitment to these values dates back to the eighteenth century Enlightenment,⁹ the full realisation of the legal implications of our commitment to these principles has taken hundreds of years to develop as we have gradually extended the scope of liberty to encompass civil, political, social, religious and economic freedoms and progressively applied the concept of equality to deal with discrimination based on grounds of age, gender, sexual preference, race, ethnicity, religious or political allegiance, class, marital status or disability.

I have also argued in Part II that once our legislators have made their choices and endorsed the importance of those values it then becomes possible for judges to use the values justifying those decisions as to the content and structure of the criminal law as a guide in the task of evaluating the state's punitive responses to breaches of the law. This approach, which is designed to achieve a consistent and coherent ordering of the relevant values, is made possible because our values not only guide our choices for the present (and can be read from our choices made in the past)¹⁰ but also because

⁸ See Davis J, 'The Science of Sentencing: Measurement Theory and von Hirsch's New Scales of Punishment' in Tata C & Hutton N (eds), *Sentencing and Society: International Perspectives*, (Ashgate, Aldershot, 2002) 329. In this respect I agree with JL Mackie who has argued in *Persons and Values*, (Oxford University Press, 1985) at 221 that the fundamental principles contained in normative systems 'are not a matter of truth or falsehood, but of choice and endorsement.' Mackie (at 215) cites Hume as saying that 'moral distinctions are founded on sentiment, not on reason' but while this may be true in general terms, I argue that the decisions made within the criminal justice system, must also respect the value that we place on consistency, coherence, rationality and reason.

⁹ The idea of equality had been emphasised by philosophers long before this time. Aristotle based his ethical and political theory on the principle of equality of all men (or more precisely, all free adult male citizens), but did not see any inconsistency in his adherence to the principle of equality and his own community's treatment of women and slaves. See references in footnote 14 below.

¹⁰ The point that our values are revealed by our choices can be traced back to Aristotle: see *The Nichomachean Ethics*, (Oxford University Press, 1998) at 54-59; is taken up by Cicero in *The Laws*, (Oxford University Press, 1998) at 103. See also Kleinig J, *Valuing Life*, (Princeton University Press, 1991) at 165 and 180; and the approach to assessing values by asking experimental subjects to make choices between alternative courses of action in Handy R, *The Measurement of Values*, (Warren T Green, St Louis, 1970). Handy explains at 94 that valuation

sentencing is itself an overtly evaluative response and not a process of first combining a measured amount of harm with a measured quantity of culpability according to an agreed 'penal equation' to yield a measurement of 'criminal seriousness' which is then transposed into an equivalent amount of punishment by multiplying it by another agreed formula.¹¹ Furthermore, this critical process of evaluation is not one that is deferred until the end of the criminal justice process. It takes place whenever decisions must be made and this means that the community's values and the relative importance of each of the elements of the good life can therefore be revealed by analysing the decisions that have been made at three different stages within the criminal justice process. The first occasion is when a community's legislators, having recognised an effect as being factually harmful, accept that the conduct which brings that harm about is normatively wrongful (in the cases *mala in se*) or ought to be viewed as wrongful in the future (in the cases *mala prohibita*) and decide that criminal punishment rather than some other response is warranted. The second time is at the point of verdict when we must weigh the evidence and consider any defences in order to decide upon the guilt or innocence of the accused, and the final time is when our judges must respond to breaches of the law and sentence the offenders.¹² It is here that the factors which first led us to the view that the conduct should be criminalised and that the offender should be found criminally responsible become directly relevant to the sentencing decision.

In Chapter Eleven, I will analyse the decisions about the structure and content of the criminal law, the defences to a charge, the nature of the criminal action, and the nature and structure of our punitive responses to offenders, that have been made at each of these three important decision-making sites within the criminal justice system with the aim of identifying the values that have informed those decisions. However, it

occurs primarily when conflicts have to be resolved and suggests at 203-204 that a value is 'a single belief that ... guides action ... beyond immediate goals to more ultimate end-states of existence.'

¹¹ For the suggestion as to the content of the 'penal equation' see Nozick R, *Anarchy, State and Utopia*, (Basil Blackwell, Oxford, 1974) at 62. For my critique of von Hirsch and Jareborg's formulaic approach, described in 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, see Davis, 'The Science of Sentencing', above footnote 8.

¹² There is a fourth source of evaluative decision-making within the criminal justice process, which consists of the decisions relating to criminal procedure and evidence law.

is not every value that is held dear by a community,¹³ that should be taken into account when we decide upon the nature and extent of the state's responses to those who breach the criminal law. Rather, we should focus upon the key values that justify the state's reason for existence, which, I would argue is to provide for the conditions under which we can live together in a safe community and share in the opportunities to pursue and enjoy a good life within that community.

I will suggest in this chapter that the three most important elements of the good life as it is conceived of in modern western liberal democracies are welfare, autonomy, and being respected by others as an equal. These three separate, irreducible aspects of living well, doing well, and being treated well by others, represent the things that we want for ourselves when we live together in a community, and, if we can identify the relative value that we place on each of these elements of the good life, we may be able to understand better the nature of the criminal law which is designed to protect it. Consequently, although this second half of the thesis will seek in Chapter Nine to identify which of our interests in welfare, autonomy and respect are capable of being set back or harmed in a factual sense, it will also attempt in Chapter Eleven to determine whether the value that we place on any of these three elements can account for our decisions as to the relative importance of the normative aspects of fault and wrongdoing within the criminal law. The value of this approach is that it provides a framework for discussion that may allow us to give factual content to the concept of harm and at the same time to go some way towards filling out our understanding of the content of the empty and open concept of wrongdoing that has caused such difficulties for those philosophers like Feinberg who have tried to find a justification for the moral limits of the criminal law. It will also reveal the links that can be made between the three key aspects of a crime (which are the *negative* aspects of wrongdoing, harm and fault) and the three essential elements of the good life (which are the *positive* aspects of welfare, autonomy and respect).

¹³ The literature on values is vast, but some of the most useful contributions can be found in: the contributions in Baier K & Rescher N (eds), *Values and The Future*, (Macmillan, New York, 1971), especially Baier K, 'What is Value?' at 33 and Rescher N, 'What is Value Change?' at 68 which gives (at 92-95) a long and fascinating list of community values; Handy R, *The Measurement of Values*, (Warren T Green, St Louis, 1970); Mackie JL, *Persons and Values*, (Oxford University Press, 1985); Griffin J, *Value Judgment*, (Clarendon Press, Oxford, 1996); Raz J, *Engaging Reason: On the Theory of Value and Action*, (Oxford University Press, 1999).

I suggested in Part II that in the absence of any agreement on a theory of ethical value, those who legislate the criminal law must find an alternative to arguing over theories of punishment and work instead from the things that unite us and the things that we have in common. I focused in that Part on the language and the concepts that we share. In this Part of the thesis I will focus on the other important aspects that we have in common and which determine the kinds of lives that we want to share together and the elements of the good life that we want to protect.¹⁴ These aspects include: our shared human nature as physical, emotional, self-directed, reasoning beings; our shared need as social and political beings to live together in communities; and, in modern times, our shared subjection to the government of the state. I will argue in section 8.3 that a full understanding of the nature of the good life for human beings can supply a foundation upon which we can build a principled model of the criminal justice process which gives priority to the normative aspects of fault and wrongdoing over the factual aspect of harm and suggest that, given the fact that our language mirrors our shared lives, our common experiences and our common nature as human beings,¹⁵ we should not be surprised if the priority of meaning given to wrongdoing over harm within the concept of a crime turns out to be reflected in a similar priority of value that can be found within our criminal justice practices.

8.3 Examining the good life

My account of the elements of the good life is an objective account that takes the point of view of a single individual, living in a modern, western, democratic state and asks what that person would desire for him or herself.¹⁶ This list considers the kind of

¹⁴ This approach is not new: Aristotle and Cicero both based their accounts of the nature of legal justice on an account of the nature of human beings and the nature of the good life for human beings (or at least men). See: Aristotle, *The Nichomachean Ethics*, (Oxford University Press, 1998) 4-24, *Politics*, (Harvard University Press, 1932); Hughes GJ, *Aristotle on Ethics*, (Routledge, London, 2001) at 11-12; and Cicero, *The Laws*, (Oxford University Press, 1998), at 103-109.

¹⁵ See: Brown, *Human Universals*, above footnote 4 at 130 who suggests that our language is a window into our culture, our minds and our actions; and Kleinig, *Valuing Life* above footnote 10 at 167: 'the world of language, the world of communication, is a world structured by human interests, albeit shared ones.' The same point was made earlier by Ludwig Wittgenstein in *Philosophical Investigations*, (Basil Blackwell, Oxford, 1968), translated by GEM Anscombe.

¹⁶ The following is a list, given in time order, of those who have made use of a similar notion of the nature of human beings and/or have taken an objective, reflective, viewpoint of the individual.

beings we are, the kind of lives that we want to live now, and the kind of treatment that we want from others in our current community and from the state itself, which exists to provide for the conditions under which we can live a good life together. Although this view of the elements of the good life is not intended as one that applies for all time or even for all places in our own time,¹⁷ it does inevitably contain

Aristotle, *Politics*, (Harvard University Press, 1932) and *The Nichomachean Ethics*, (Oxford University Press, 1998) provides an objective account based on a reflective understanding of humans as embodied, emotional, desiring, self-directing, rational agents equipped by nature to function in a community (polis).

Cicero, *The Laws*, (Oxford University Press, 1998) at 102-104 writes of man as 'a single species which has a share in divine reason and is bound together in a partnership in justice', and 'a creature of foresight, wisdom, variety, keenness, memory, endowed with reason and judgment'.

Mill JS, *On Liberty and Other Essays*, (Oxford University Press, 1998) followed Jeremy Bentham in viewing human happiness as the ultimate moral measure and built upon Bentham's account by taking an objective view of the ideal nature of man as a progressive being as the basis of his account which seeks reflective agreement on values and virtues as well as happiness.

Hegel's theory of punishment rested on the recognition of the shared rationality and dignity of all members of any community of rational, free, self-realising persons. See Dubber MD, 'Rediscovering Hegel's Theory of Crime and Punishment' (1994) 92 *Michigan Law Review* 1601.

Rawls J, *A Theory of Justice*, (Oxford University Press, 1973) focused on the satisfaction of rational desire from a position of 'reflective equilibrium' from behind a 'veil of ignorance'.

Griffin J, *Well-Being: Its Meaning, Measurement and Moral Importance*, (Oxford, Clarendon Press, 1986) proposes a rational 'informed-desire' account of well-being.

Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 171-173, builds her account upon 'the primacy of the social' and a view of humans as relational beings, living in communities, and not simply rational self-interested calculators. See also 198-199.

Braithwaite J & Pettit P, *Not Just Deserts: A Republican Theory of Criminal Justice*, (Clarendon Press, Oxford, 1990) build their account upon the republican ideal of dominion at 54-85.

West R, 'Rights, Capabilities and the Good Society' (2001) 69 *Fordham Law Review* 901; 'The Other Utilitarians' in Bix B (ed), *Analyzing Law: New Essays in Legal Theory*, (Clarendon Press, Oxford, 1998) 197; *Caring for Justice*, (New York University Press, 1997) suggests that we must seek a balance between the objective and subjective accounts of harm, the nature of value, and the good life for human beings, that respects the nature of female as well as male lives, experiences, and interpretations of the idea of justice.

¹⁷ So, for example, the conception of the good life in an Islamic state might well be aimed at bringing the life of each person in the nation into a state of harmony with Allah as directed by the teachings of the prophet Mohammed.

elements that appear in other collections,¹⁸ because, like all of the other accounts that have been assembled either by philosophers, legal theorists, or economists seeking to

¹⁸ Many philosophers, theologians, lawyers and, more recently, economists have attempted to define the nature of the good life and to list its elements. Some useful lists of the elements of the good life can be found in the following alphabetical list.

Allardt E, 'Having, Loving, Being: An Alternative to the Swedish Model of Welfare Research' in Nussbaum MC & Sen A (eds), *The Quality of Life*, (Oxford University Press, 1993) 88 at 89-92 gives a model based on both objective and subjective measures of: 'Having' (the conditions necessary for survival and avoidance of misery: economic resources; housing; employment; working conditions; health and medical treatment; education); 'Loving' (the need to relate to others: attachments within the community; attachments to family and kin; friendship; attachments in associations; and relationships with workmates); and 'Being' (integration into society and living in harmony with nature: participation in activities and decisions influencing one's own life; political activities; leisure activities; meaningful work; enjoyment of nature).

Bentham began Chapter V of *An Introduction to the Principles of Morals and Legislation*, Burns JH & Hart HLA (eds), (Athlone Press, London, 1970) with a list not only of the pleasures of but also the pains of life. Note that some items appear on both lists. The pleasures of life are those of: sense; wealth; skill; amity; good name; power; piety; benevolence; malevolence; memory; imagination; expectation; association; and relief. The pains of life of: privation; senses; awkwardness; enmity; ill nature; benevolence; malevolence; memory; imagination; expectation; and association.

Erikson R, 'Descriptions of Inequality: The Swedish Approach to Welfare' Nussbaum MC & Sen A (eds), *The Quality of Life*, (Oxford University Press, 1993) 67, lists at 68: health and access to health care; employment and working conditions; economic resources; education and skills; family and social integration; housing; security of life and property; recreation and culture; and political resources.

Feinberg J, *Harm to Others*, (Oxford University Press, 1984) at 37 lists the basic requisites of individual well-being (ie, the welfare interests) as: life; health; physical integrity and functioning; absence of absorbing pain or grotesque disfigurement; minimal intellectual acuity; emotional stability; the absence of needless anxieties and resentments; social intercourse and friendship, minimal income and security; tolerable social and physical environment; and a certain amount of freedom from interference and coercion. He lists the public interests that we all share at 63-64: public peace; health, security from foreign enemies, a sound economy; and governmental services and systems like taxation, customs inspections, judicial and court structures.

Finnis J, *Natural Law and Natural Rights*, (Clarendon Press, Oxford, 1980) at 86-90 lists the good things as: life; knowledge; play; aesthetic experience; sociability (friendship); practical reasonableness; and religion.

Griffin J, *Well-Being: Its Meaning, Measurement and Moral Importance*, (Oxford, Clarendon Press, 1986) at 67-68 lists accomplishment; the components of human existence (agency, autonomy, basic capabilities to act, etc); understanding and knowledge; enjoyment; and deep personal relations.

measure the quality of life, it must recognise the nature of human beings as embodied, social, rational, emotional and self-directed beings possessed of a shared language and a common passion for justice.¹⁹ By contrast with the approaches to ethical theory

Hall J, *General Principles of Criminal Law*, (Bobbs-Merrill, Indianapolis, 1960) at 215-216 gives a number of lists, including those given by: Jhering (life; freedom; honour; and money); Pound (general security; social, domestic and religious institutions; general morals; social resources; general progress and life); Spranger's six values (intellectual; economic; aesthetic; social; political; and religious); Lasswell and McDougall (power; respect; enlightenment; wealth; well-being; rectitude; skill; affection); and Parson and Shils (body and health; property; knowledge; beauty; ideology; affiliation; succorant object; authority over others; prestige and reputation; leadership; nurturant object; place in a group).

Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 101-107 lists the individual interests as: physical integrity; property; health; sexual autonomy; and the social and collective interests (which include the preservation of society itself; the environment; public order, public health and safety; the administration of a system of justice.)

Nussbaum MC, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273 at 287 includes: life; bodily health; bodily integrity; the use of the senses, imagination and thought; emotional attachments; practical reason; affiliation (friendship and respect); contact with other species; play; and control over one's environment (political and material).

Rawls J, *A Theory of Justice*, (Oxford University Press, 1973) at 92: rights and liberties; opportunities and powers; income and wealth; and a sense of one's own worth.

von Hirsch A & Jareborg N, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1 at 19 follow the 'living standard' or 'capabilities' approach of Amartya Sen (see below) and list the elements of a good life that are relevant to victimising crimes as: physical integrity; material support and amenity; freedom from humiliation; and privacy/autonomy.

For a discussion of the general nature of the good life see also Nussbaum MC & Sen A (eds), *The Quality of Life*, (Oxford University Press, 1993) which includes: Sen A, 'Capability and Well-being' at 30; Cohen GA, 'Equality of What? On Welfare Goods, and Capabilities' at 9; Korsgard CM, 'Commentary on Cohen and Sen' at 54; Van Praag PMS, 'The Relativity of the Welfare Concept' at 362. See also Dasgupta P, *Human Well-being and the Natural Environment*, (Oxford University Press, 2001); Sen A, *Choice, Welfare and Measurement*, (Blackwell Publishers, Oxford, 1982); West R, 'Rights, Capabilities and the Good Society' (2001) 69 *Fordham Law Review* 1901.

¹⁹ The phrase is taken from Robert Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract*, (Addison-Wesley, New York, 1990). See also Bandes S (ed), *The Passions of Law*, (New York University Press, 1999), which includes contributions by Solomon R, 'Justice v Vengeance: On Law and the Satisfaction of Emotion' at 123; Massaro TM, 'Show (Some) Emotions' at 80; Murphy JG, 'Moral Epistemology, the Retributive Emotions and the "Clumsy Moral Philosophy" of Jesus Christ' at 149; and Sarat A, 'Remorse, Responsibility and Criminal Punishment: An Analysis of Popular Culture' at 168. See also Kahan DM & Nussbaum MC, 'Two

taken by some others, I have not sought to construct any kind of external or cosmic view of the issues, for example, by trying to imagine or understand the view of any supernatural being, nor have I attempted, in Henry Sidgwick's famous phrase, to take 'the point of view of the universe'.²⁰ Neither have I presupposed that we should base our decisions over which of the aspects of the good life are to be protected by measuring an aggregate of happiness, welfare, utility, efficiency or preferences.²¹

Conceptions of Emotion in Criminal Law' (1996) 96 *Colorado Law Review* 269; and Pillsbury SH, 'Emotional Justice: Moralizing the Passions of Criminal Punishment' (1989) 74 *Cornell Law Review* 656; West R, *Caring for Justice*, (New York University Press, 1997).

Many anthropologists, psychologists, evolutionary biologists and economists have taken up the task of identifying, describing and accounting for the origins and nature of this universal passion for justice which characterises human beings and human societies. A useful collection of psychological explorations are Lerner MJ & Lerner SC (eds), *The Justice Motive in Social Behavior*, (Plenum Press, New York, 1981) which includes chapters by: Hogan R & Emler NP, 'Retributive Justice' at 125; Karniol R & Miller DT, 'Morality and the Development of Conceptions of Justice' at 73; Lerner MJ, 'The Justice Motive in Human Relations' at 11; Peachey DE & Lerner MJ, 'Law as a Social Trap' at 439.

A more recent collection edited by Ross M & Miller DT, *The Justice Motive in Everyday Life*, (Cambridge University Press, 2002) includes contributions by: Batson DC, 'Justice Motivation and Moral Motivation' at 91; Montada L, 'Doing Justice to the Justice Motive' at 41; Vermut R, 'The Justice Motive in Perspective' at 63; Fernandez-Dols J, 'Perverse Justice and Perverse Norms' at 79; Vidmar N, 'Redistributive Justice: Its Social Context' at 291; Darley J, 'Just Punishments: Research on Retributional Justice' at 314.

For discussions of the evolution of the justice motive and its role in social and economic life, see also: Brown DE, *Human Universals*, (Temple University Press, Philadelphia, 1991); Eckman P, 'An Argument for Basic Emotions' (1992) 6 *Cognition and Emotion* 169; Plutchik R, *Emotion: A Psycho-evolutionary Synthesis*, (Harper & Row, New York, 1980); Bowles S & Gintis H, 'The Economy as a Complex Evolving System', <http://www-unix.oit.umass.edu/~gintis/papers_ind> November 2001; Sigmund K, Fehr M & Nowak MA, 'The Economics of Fair Play' (2002) 286 *Scientific American* 80 and references therein.

²⁰ Sidgwick's phrase, from *The Methods of Ethics*, (MacMillan, London, 1887), has in modern times been taken up by Peter Singer, who has written extensively on an ethical theory, which extends to consider the rights of both animals as well as humans in *How are we to Live? Ethics in an Age of Self Interest*, (Text Publishing, Melbourne, 1993) and *Animal Liberation*, (Cape, London, 1976).

²¹ I have not pursued this aspect of ethical theory, partly because I want to avoid such theories, but also because I understand sentencing to be a process of evaluation, not measurement. But see: Posner RA, *Economic Analysis of Law*, (Little Brown, Boston, 1977); *The Economics of Justice*, (Harvard University Press, 1981). See also the exchange between Kaplow L & Shavell S, 'Fairness

The literature discussing human values, the nature of harm, justice and the good life, the content and measurement of human wellbeing, the quality of life and standards of living is vast and intersecting. It has deep roots in moral and political philosophy and, more recently, has been connected to legal and economic theory and comparative investigations by psychologists and anthropologists.²² It is easy to see the connections between these different disciplines when we compare the philosopher Jean Hampton's definition of harm as 'a disruption or interference in a person's well-being including damage to ... capacities to function, life plans, or resources'²³ with the definition of well-being given by the economist/philosopher Amartya Sen as 'a person's ability to do valuable acts and reach valuable states of being'²⁴ and the definition of a value given by the behavioural scientist Rollo Handy as a single belief that guides action beyond immediate goals to more ultimate end-states of existence.²⁵ I have drawn on these separate streams of thought to construct my account of the elements of the good life, but my use of this account differs somewhat from the others in that I extend it as an analytical tool to serve three different purposes. The first is to help to identify the categories of harm and to give some factual content to the nature of criminal wrongdoing; the second is to use it as the basis for evaluating the seriousness of a crime; and the third is to use it as an aid in evaluating the importance of the roles that our criminal justice processes have allocated to the aspects of harm, wrongdoing and fault. Each of these exercises is designed to find a principled basis upon which to construct a model of a crime that can show that each one of the stages of legislation, conviction and sentencing is part of a coherent and consistent ordering of the community's fundamental values within its criminal justice processes.

There are two reasons why I have chosen to take the point of view of a single individual and focused on objective desires as the core of my account of the good life:

Versus Welfare' (2000) 114 *Harvard Law Review* 961 and Farnsworth W, 'The Taste for Fairness' (2002) 102 *Columbia Law Review* 1992.

²² See the references in footnotes 10, 13, 14, 15, 16 and 19.

²³ Hampton J, 'Correcting Harms Versus Righting Wrongs' (1992) 39 *University of California at Los Angeles Law Review* 1659 at 1662.

²⁴ Sen A, 'Capability and Well-being' in Nussbaum MC & Sen A (eds), *The Quality of Life*, (Oxford University Press, 1993) 30.

²⁵ This definition is adapted from the one given by Rollo Handy at 203-204 in *The Measurement of Values*, see above footnote 10.

the first is theoretical, the second is practical. The first and most important reason lies in the fact that the criminal law is addressed to each one of us as individuals and can potentially affect the liberty and well-being of every person in the community. To be convincing, therefore, any account of the criminal law (and the good life it protects) must be based on the facts of our existence; must be clearly expressed so that anyone can understand it; must be aimed at goals that will appeal to ordinary individuals; and must spell out the basis upon which it can command each and every person's allegiance. In my view, the most fruitful ground for creating understanding, conviction and allegiance is a direct appeal to personal desire. Legal theories, particularly those that purport to justify the criminal law, must be able to explain to an ordinary person why each of us would want things to be a certain way,²⁶ given the lives that we want to lead and the circumstances that we find ourselves in. In this respect I am in agreement with JL Mackie, who argued that the fundamental principles underlying normative systems are 'not a matter of truth or falsehood, but of choice and endorsement';²⁷ RM Hare, who argued that 'the notion of interests is tied in some way or other to the notion of desires and that of wanting';²⁸ and with Peter Alldridge, who argues we should not base our account of the legitimacy of the criminal law on assumptions of universal moral approbation and shared moral sentiments.²⁹ I argue that the prohibitions of the criminal law are based upon protecting a vision of the good life that each person living with others under the government of the state can identify with and desire for themselves, and I want to

²⁶ Richard Delgado reports Stanley Fish as saying in his 'long goodbye to law' that, instead of resorting to arguments of principle, it is easier to change someone's beliefs by showing how the consequences of their beliefs conflict with something else they hold dear. See Delgado R, 'Where is my Body? Stanley Fish's Long Goodbye to Law' (2001) 99 *Michigan Law Review* 1370 at 1379. See also Joel Feinberg's discussion of Santayana's view that the only kind of argument in ethics is the *argumentum ad hominem*, in *Harm to Others*, above footnote 18 at 18-19.

²⁷ Mackie, *Persons and Values*, above footnote 8 at 221.

²⁸ Hare RM, *Essays on the Moral Precepts*, (University of California Press, 1972) at 96.

²⁹ See Alldridge P, 'Making Criminal Law Known' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 103 and Duff RA, 'Rule-Violations and Wrongdoings' in the same volume at 47. Alldridge (at 104) criticises Duff who argues (at 53) that we must base the criminal law upon declarations of our shared moral values that bind each person as members of the political community. See also Marshall SE & Duff RA, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7.

suggest that, once we understand that this vision of the good life itself contains a combination of both factual and normative elements, we can account for much of the structure and form of our criminal law without the need to resort to cosmic theories of ethics to direct our decisions.

The second, practical, reason why I have adopted one person as ‘the measure of all things’³⁰ is because taking the most basic possible point of view offers a logical way to categorise the elements of the good life and build them up into one comprehensive, all purpose list. By asking what any one person might want to have (like possessions and access to government services) and the things they might want to be (eg, healthy and safe) we can construct a list of the sub-strands of our welfare or our *passive well-being*. By asking what a person might want to be able to choose to do (like worship in their own way or spend time travelling, gardening or reading) or to try to achieve (in terms of family size or career aspirations, for example) we can identify the constituent elements of our autonomy or our *active well-being* (or, as John Stuart Mill called it, well-doing).³¹ Finally, by asking how each person would want to be treated by other persons in their everyday dealings and by the state itself when decisions must be made that concern them (both as an individual and as a member of a community) we can explain the value we place on the relational notion of *being well treated* by others in terms of equality and respect. These inquiries into what we want for ourselves and what we want from others yields a three part picture of the things we value most in our search for the good life. My definitions of these three elements of the good life and the particular focus of each one is summarised in Table 8.1 below.

³⁰ The sophist Protagoras coined the famous doctrine that ‘man is the measure of all things’ in the fifth century BCE: see the entry for ‘Protagoras’ in Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 725.

³¹ John Stuart Mill saw the good life as composed of ‘well-being’ and ‘well-doing’ in *On Liberty and Other Essays*, (Oxford University Press, 1998) at 84, and the useful notions of ‘passive well-being’ and ‘active well-being’ used by John Gardner neatly match Mill’s two elements: see ‘On the General Part of the Criminal Law’ in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 205. See also Raz J, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) at 145-146, on the difference between ‘action reasons’ and ‘outcome reasons’ discussed by Gardner at 211. See also footnote 41 below, noting Aristotle’s view that both virtue (or good-doing) and good fortune (in terms of bodily and material goods) are necessary elements of the good life.

TABLE 8.1 THE BASIC ELEMENTS OF THE GOOD LIFE		
WELFARE Having and Being	AUTONOMY Choosing, Doing and Achieving	RESPECT Counting as an Equal
1. DEFINITION Welfare encompasses all those things, both internal and external to the person, that are important for human existence. 2. FOCUS Passive states of well-being.	1. DEFINITION Autonomy is the exercise of control over the conduct of one's own life by defining, choosing and pursuing the good life on one's own terms. 2. FOCUS Active states of well-being or 'well-doing'.	1. DEFINITION Respect is an attitude which recognises that each human being is entitled to be treated as a person of equal dignity, worth and value. 2. FOCUS A relational state of being well treated – or being treated right – by others.

I argue that the three elements of welfare, autonomy and being respected as an equal are separate, qualitatively different, irreducible aspects of the good life for a human being living in a modern democratic state. If one of the crucial elements is missing, no improvement or increase in any one of the others can make up the loss. The pampered slave, whose welfare interests³² are completely satisfied, but whose entitlements to equal respect and the free exercise of his autonomy are denied, cannot be said to be living a good life. Equally, the woman, whose entitlements to exercise her autonomy and to be treated as a person of equal value are constitutionally guaranteed, but whose living conditions of deprivation and poverty mean that her choices are limited to deciding which of her children will get enough to eat, does not have a good life.³³

On the other hand, there are clear relationships between the three elements of the good life which ensure that the total package combines into a self-reinforcing whole. An adequate welfare base lays the foundation for the exercise of our autonomy; the

³² Throughout this chapter I will often use the term interest in its ordinary sense rather than in a strict legal sense to identify the different strands or dimensions of the elements of the good life.

³³ Partha Dasgupta, *Human Well-being and the Natural Environment*, (Oxford University Press, 2001) at 37 explains how destitution creates both physical pain as well as the moral pain of having to make tragic choices over the allocation of food and health care.

profitable exercise of our autonomy may improve our overall levels of welfare; and, provided our entitlements to pursue and enjoy our interests in welfare and autonomy are respected by others and we count equally with others in the eyes of the state,³⁴ our security in those entitlements is increased. As we shall see when classifying the different categories of harm in this chapter and when analysing the different elements of the various criminal offences in Chapter Ten, some of the interests traditionally protected by the criminal law contribute both to our welfare and to our autonomy. So, for example, our interest in bodily integrity is valued not only because an intact, functioning body that is free of pain is, of itself, an important determinant of our health, happiness and welfare, but also because our ability to use our bodies (to work, to play and to do those things that are necessary for ordinary daily living) and to control our bodies (in terms of being able to decide what happens to us and who may have access to our bodies) is crucial to the exercise of our autonomy. The apparent overlap between our welfare (or having and being) and our autonomy (or choosing and doing) is explained by the fact that we often want to 'have' something (like a swimming pool) so that we can 'do' something with it (perhaps to swim in it ourselves, or perhaps to charge others a price for admission to it) and this profitable use can in turn feed back and improve our welfare or expand our capacity to exercise our autonomous choices (by improving our health or our purchasing power). Once we recognise the connections between these different elements and realise that any one particular law can protect more than one valued aspect of the good life, our understanding of the nature of harm and our appreciation of the purposes of the criminal law can be deepened, and, at the same time, the usefulness of basing our analysis on the good life values is revealed.

By taking the point of view of an individual and by factoring into our account the reality that in modern times we must live together with others within a community governed by the state, we can construct a comprehensive list of the objectively desirable elements of the good life which can be ordered around one reference point. The good life elements can then be applied to a number of different analytical purposes, starting with the first task of identifying and classifying harm in its ordinary

³⁴ See for example, Dasgupta, *Human Well-being and the Natural Environment*, above footnote 33 at 38, citing studies confirming that unemployment contributes to unhappiness and that local democracy is conducive to happiness in both rich and poor countries.

sense, and ending with the final task of evaluating the importance of the roles played by harm, wrongdoing and fault within our criminal justice processes. If the good life list contains all of the fundamental items of value, its use will allow us to pinpoint the issues and facts relevant to our decisions about harm both inside and outside the criminal law; to identify any potential conflicts between values; and, most importantly, it will allow us to apply the same standards of judgement consistently throughout the different stages of our analysis without having to construct any other analytical models, lists or taxonomies (as Feinberg does)³⁵ and then having to find a way to reconcile one list with others. Basing the analysis on a single set of values within a single frame of reference will also ensure that we can track any similarities and differences between the evaluative criteria that have been used by legislators and judges at each of the decision-making points within the criminal justice process and build up a complete picture of the interplay between those values at each of the crucial stages of legislation, conviction and sentence.

Because this list of the good life values is not divided into public and private interests, or restricted only to the interests currently protected by the criminal law, or limited to those things to which we have an established claim or right,³⁶ but is simply designed to capture what a person living in our community might want, its use does not assume in advance the answers to any of the important questions relating to the

³⁵ For example: Feinberg has three different lists of interests taken from two different points of view (welfare, ulterior and public); he adopts a taxonomy of crimes which is based around the different effects of the conduct (harm to others, harm to self, offence to others and harmless wrongdoing); he has another taxonomy of 'evils' or states of affairs to be regretted (theological evils, legislative evils which include grievance evils, non-grievance evils, welfare connected evils and free-floating evils) which are classified partly by cause and partly by effect; and many of the critical concepts or values (eg, the notions of autonomy, rights, wrongdoing and fault) that dominate his discussion and do most of the work in limiting the extent of the criminal law do not appear to have a defined or consistent role within any of these aids to analysis. So, although all of the items that we might wish to take into account are mentioned, the final product does not yield a single, integrated model.

³⁶ See, for example, the difficulties encountered in discussing harm by both Judith Jarvis Thompson (who bases her arguments on an understanding of harm as the result of an infringement of a legitimate claim against others) and Joel Feinberg (who, as we saw in section 2.1 of Chapter Two, defines 'harm' as the effect of a wrongful invasion of a right that sets back someone's welfare interests). See Thomson JJ, *The Realm of Rights*, (Harvard University Press, 1990) at 248, 264-267; and Feinberg, *Harm to Others* above footnote 18 at 31-103. I expand upon this issue in section 9.2.

nature of harm, wrongdoing, and fault or their relevance to legislation, conviction or sentence. Furthermore, because it can be standardised around one point of reference, this account of the good life values is flexible in its application and not limited only to questions relating to criminal justice. So, unlike von Hirsch and Jareborg's living-standard gauge,³⁷ which is aimed at assessing only victimising crimes, and Feinberg's account, which is restricted to harm caused wrongfully and indefensibly in violation of a victim's rights by another human being,³⁸ this account can be used to identify and evaluate harm of any kind (however caused), and, because it offers an understanding not only of harm, but of wrongdoing and fault as well, it can be adapted to evaluate the seriousness of crimes of any kind (whether *mala in se* or *mala prohibita*). Finally, because it is designed as an aid to evaluation and not intended as a quantitative measuring device, it does not create the illusion of a scientific sense of precision³⁹ and remains uncomplicated by the need to argue over any numerical values that should be placed on each item.

These features allow us to apply the same analytical process using the same set of values to each of the questions we need to answer and to move from the initial question about the nature of harm (which in its ordinary sense is not tied to the criminal law) to consider specific issues located at the heart of the criminal law. They also increase the chances of constructing a model that will be consistent not only with the ordinary way that we use the key terms, but also with the principles and the ordering of values that justify the decisions made within our criminal justice system. Moreover, because the analysis is based upon what we are and what we want for ourselves, and not upon those things that a philosophical theory of ethics has dictated should be imposed upon us, it also increases the likelihood that ordinary citizens will be able to understand and accept the decision-making model that this account of the good life and the criminal law is able to produce and justify.

In the first two parts of this thesis, I have followed others in assuming that harm is a significant factor within our criminal law and is one that has an important bearing

³⁷ See von Hirsch & Jareborg, 'Gauging Criminal Harm' above footnote 18.

³⁸ See Feinberg's list of interests in footnote 18, above and references in footnote 36, above.

³⁹ Mathieson T, *Prison on Trial*, (Sage, London, 1990) in Chapter Five 'Justice' at 103-136, especially at 134, directs this criticism at all retributive accounts (like that of von Hirsch) which rely on devising proportionate punishments.

on our decisions not only to declare conduct to be criminal but also on our sentencing decisions. However, the time has come to question this assumption. I have defined wrongdoing as conduct that deviates from a rule, norm or standard of conduct thought to be right and I have defined a crime as conduct in breach of a rule or norm of conduct thought to be right by a community's law-makers, where it is also thought to be right that the state should respond to that conduct by imposing hard treatment on offenders found to be in breach of that the norm. Given that the definitions of these two normative concepts do not include any reference to the concept of harm, it is necessary to consider first whether harm should have any role to play within our criminal justice decision making process, and if it can be shown that it should have a role, it then becomes necessary to specify what that role might be.

Chapter Nine will begin this investigation by applying the test contained in the definition of harm to the three elements of the good life (which comprise our welfare interests, our autonomy interests, and our desire to be respected as persons of equal value) in order to identify the categories of harm that may be relevant to the decisions that we must make in the criminal justice process. It will also consider whether any of the three negative aspects of a crime can be linked with any of these three positive elements of the good life. I argue in this chapter that the two factual elements of the good life, namely, welfare and autonomy, can be linked with the factual aspect of harm and that the relational element of the good life, namely, being respected by others as an equal, informs our understanding of the normative aspects of wrongdoing and fault. This chapter concludes with a suggestion that both the normative and the factual harm based elements of the good life for human beings should be reflected into our concept of a crime and that both of these dimensions should be relevant to our sentencing decision. I argue that in our current community we can describe a crime as conduct that is read as bearing a message of disrespect for the equal value of others (the normative limb) and their equal entitlements to pursue and enjoy their welfare and exercise their autonomy within the boundaries provided for by the state (the factual limb) and I ask whether, in order to complete our understanding of our criminal justice practices, we should supplement the factual 'harm to others' principle with a normative principle that requires 'equal respect for others'.

The link made in Chapter Nine between the elements of the good life and the aspects of a crime will be used in the final part of the thesis to introduce a model of a crime that can be used to evaluate the decisions taken within our criminal justice

process and to assess the relative seriousness of a crime. Chapter Ten gives an account of this two dimensional model and illustrates its operation by analysing a number of crimes, including both those *mala in se* and those *mala prohibita*. It suggests that the 'equal respect' principle – and the concepts of wrongdoing and fault with which it is linked – may be the critical factors that explain many of our key decisions within the criminal law.

Chapter Eleven tests this hypothesis by analysing the decisions made at the three stages of legislation, verdict and sentence in order to evaluate the relative priority which is given to the factual aspect of harm and the value we place on our welfare and our autonomy by comparison with the priority given to the normative concepts of wrongdoing and fault and the underlying value of equal respect for others. It also analyses a number of contested cases and observes that the conduct forbidden by these controversial offences (like abortion, adultery, begging, drug use, prostitution, etc) does not appear to demonstrate any disrespect for the entitlements of others to be treated as an equal. I conclude that the 'equal respect for others' principle and the normative aspects of wrongdoing and fault with which it is associated are properly and consistently given a higher priority of value within our criminal justice practices and suggest that our decision-making model which will be applied to the sentencing decision in Chapter Twelve should reflect this fact.

Chapter Nine

Giving Content to the Categories:

Identifying Harm, Wrongdoing and Fault

9.1 Introduction

This chapter has two aims. The first is to identify in the broadest terms the nature and extent of the different categories of harm by applying the test contained within the definition of harm to each of the three elements of the good life, namely, our welfare, our autonomy and our desire to be respected by others as persons of equal worth and value. This catalogue of harms will be created by asking whether we consider ourselves to be worse off if the conduct of others has a negative effect on any of those three elements. The second, related aim, which will be considered at the same time as the first, is to see whether we can make any links between the three negative aspects of a crime (wrongdoing, harm and fault) and the three positive elements of the good life (welfare, autonomy and respect).

Both of these aims are based on the supposition that there may be a logical connection between the oppositional concepts of right and wrong, and good and bad, which would make an appreciation of the positive concept an essential step towards a better understanding of the corresponding negative concept. The strength of this hypothesis is confirmed by the observation that words like good and bad have two senses which encompass both factual and normative connotations.⁴⁰ So, for example, in the same way that the word good is used to refer to the things that are good for us (like exercise or vitamins) as well as those things that are morally good to do (like helping others or keeping our promises); so too can the word bad refer to the things (like physical inactivity or poisons) that are bad for us in the sense that they are harmful, as well as to the things that are considered morally bad to do (like wantonly hurting others or breaking our promises). The issue is whether we can identify any similar cross-connections between the normative and the factual aspects of a crime

⁴⁰ See also my discussion of the word injury in section 6.3 of Chapter Six.

and the elements of the good life.⁴¹ This chapter will therefore begin by applying the understanding of the concepts of wrongdoing, harm and fault that were developed in the first two Parts of the thesis to the three elements of welfare, autonomy and respect.

9.2 Welfare and the concept of harm

The foundational element of the good life is our welfare, which I have defined as including all of the factors important to human existence, whether they are internal to the person (for example, physical, mental and emotional health) or external to the person (for example, housing, good drinking water and access to government services). However, before we can apply our test for harm and decide whether we consider ourselves to be worse off if an event has a negative effect on our welfare, we need to get a clear picture of the range of factors that are necessary to ensure our welfare. If we begin by considering the nature of human beings as conscious, thinking, feeling, physical beings, we can start the list with the three crucial aspects of physical, emotional and mental health. To live a good life, we need minds, bodies and emotions that function properly and which allow us to act, think and respond in ways that help us to understand and to control not only ourselves but also the environment that we live in. To sustain health and to live well, we need a safe physical environment, including access to safe food and medicine; clean air, water and sanitation; conditions in which we can sleep; shelter, clothing and protection from natural elements (like the sun, rain and wind) and natural forces (like earthquakes, dangerous animals, etc); and power or fuel supplies for heating, cooling and cooking.

Humans are also socially and emotionally interdependent creatures who, at various stages of life, are dependent on the physical and emotional care given to them by others. While our desire to care for others is an important aspect of our autonomy, our

⁴¹ Since ancient times philosophers have debated whether the good life for human beings must contain a requirement of moral goodness: see the entry for '*Eudaimonia*' (the objectively good life) in Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 252, discussing the debate between Socrates (who thought that a virtuous life was sufficient) and Aristotle (who thought that both virtue and good fortune in terms of bodily and material goods were necessary. See also in the same volume the entries on 'Aristotle' at 54-55 and 'Wellbeing' at 908 (which outlines the debates over the connection between our notions of wellbeing and the good life and asks whether wellbeing itself 'spans both the moral and the non-moral aspects of life.'). Martha Nussbaum's book *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, (Cambridge University Press, 1986) contains an extensive discussion of this debate.

need to be cared for by others within intimate family groups and in relationships of attachment, friendship and love is crucial to our welfare,⁴² and our desire to have close physical, emotional and sexual contact with other human beings extends in different forms throughout our lives. Because we value our place in social groups and rely upon relationships of goodwill and the friendly attitudes of others, we are also jealous of our good name and reputation. Beyond this desire to enhance our social, physical and emotional bonds with others, we also want to develop our own sense of identity and advance our self-esteem, knowledge, mental skills, spirituality, creative abilities and cultural, historical and aesthetic awareness – not only because such activities are satisfying in themselves (and so constitute one of the strands of our interest in autonomy or active well-being) but also because the development of our ability to understand ourselves, our history, our world and each other, enhances our capacity to improve the state of our welfare. Consequently, we value access to educational, research, sporting, cultural, worship and recreational facilities.

Given that individuals cannot provide for themselves all of the things necessary to survive and flourish in the modern world, we also want access to a range of services and supplies which may be provided either by private or public bodies, including: primary products, manufactured goods and shops to buy them from; fire and emergency services; plumbing and sanitation infrastructure and services; medical supplies, health and hospital services; transportation infrastructure and services; communications facilities; research facilities; and financial services. To maintain our means of access to the goods and services that we want to use, we need opportunities for the accumulation of wealth in order to pay for them. We therefore want access to education and training to develop our physical and intellectual skills and opportunities to obtain income by employment and trade.⁴³ To ensure that the products which we want to buy are safe to use (and are produced in safe workplaces), and that the services which we want to use are safely provided to us by those who are properly

⁴² Recent feminist accounts of the nature of human beings, the good life and the law emphasise our needs to care for others and to be cared for by others and argue that male centred accounts of the law and justice have traditionally ignored these needs. See: West R, 'Rights, Capabilities and the Good Society' (2001) 69 *Fordham Law Review* 1901 at 1922-1929; *Caring for Justice*, (New York University Press, 1997) at 109-132; and also Lacey N, *Unspeakable Subjects*, (Hart Publishing, Oxford, 1998) at 4-7 and 61-66.

⁴³ This aspect may also overlap with our pursuit of our active well-being or autonomy.

qualified to do so, we need to establish regulatory and licensing systems that set and enforce product safety standards, occupational and workplace safety standards as well as the standards for the training and qualifications of workers and service providers.

When circumstances like age (either infancy or old age), incapacity, sickness or unemployment prevent us from providing for ourselves, we want others to help us. This means that we need access to individuals or groups that are willing to provide any necessary goods, income support and caring services, for example: family members, friends, mutual assurance and insurance associations, unions, community charitable groups and government agencies. Our desire for others to help us is paralleled by our wish to be protected from those who might hurt us. Because we are social beings whose security and wellbeing depends greatly on the conduct of others, we want political, judicial and administrative decision-making institutions that will set and maintain certain standards of behaviour so that we can live confidently alongside others whose interests and desires may conflict with our own. The fact that human beings are capable of hatred and indifference towards others and are often motivated to ignore the law, means that we need the state to provide police services within the community as well as defence forces that can respond to external threats of violence. We also want to be able to resolve our conflicts with others, both inside and outside the state, in ways that can avoid the use of force and so we have an additional need for courts and mediation services within the community as well as diplomatic services to deal with external conflict and maintain international goodwill.

All of these services must be paid for, and to this end we also need to have a system for the necessary organisation (and reorganisation) of the community's resources and wealth, for example, a taxation and administration system that can pay for the full range of services that we want the modern state to provide. Given that these government services are necessary to ensure each person's security and welfare, we might also want the officials who design and administer them to be open to scrutiny, to be responsive to our needs, and to be willing to listen to our opinions when they make decisions that concern us. As we shall see, this is another point where the elements of the good life converge; if we want our interests to be taken into account by those state officials whose decisions affect our welfare, we might also want the entitlement, as part of the exercise of our autonomy, to be able to participate openly in the political and judicial processes that lead to those decisions, and we might also want our interests to count as equal to those of anyone else.

This list of the things that we might want for ourselves reveals the importance of the role played by the state in securing our welfare as each of us strives, paradoxically, both to compete and to cooperate with others in our search for the good life for ourselves, our families and our communities.⁴⁴ Not every person might feel the need for every item on the list and different people and different communities may vary in the relative value that they place on some of the items on this list, but viewed objectively, these are the main threads or dimensions of our welfare, and a moment's thought reveals that much of our own time and much of the government's time is spent on activities designed to achieve and maintain them. Given the fundamental importance that these things have for our very existence and the enormous amount of time and care that we devote to securing these interests, it is easy to conclude that we would consider ourselves to be worse off – or harmed – if an event occurred that had a negative effect upon any of these aspects of our welfare. If we suffer any actual setbacks to our physical, emotional or mental health; if our physical environment is ruined; if our reputation is destroyed; if we lose our income,⁴⁵ our possessions or our wealth; if we lose our family, our friends or our access to any of the community institutions that sustain our welfare, we would be worse off, and we would characterise any events that make us worse off in any of these ways, as harmful.

One issue that is sometimes raised in discussions of harm and our welfare interests is the question of thresholds. Feinberg sets minimum qualifying thresholds within each category before he allows an effect to be counted as a 'harm'⁴⁶ whereas I suggest that any setbacks to welfare interests that make a person worse off should be classified as harms. Feinberg has also restricted the scope of the inquiry to humanly caused harm that is a wrongful invasion of a person's rights and so he does not count as 'harm' any setbacks to our welfare interests caused by natural disasters, like earthquakes or epidemics, which he classifies instead as 'theological evils'.⁴⁷ These

⁴⁴ Whether or not a state identifies itself as a welfare state and guarantees particular levels of welfare, the importance of the role of the state in securing our welfare in modern times cannot be ignored.

⁴⁵ So, financial setbacks caused by economic competitors would count as a harm, but they might not be the kind of harms that we consider to be wrongfully caused, unless they are the result of unfair competition. I discuss this issue further below in section 11.2 of Chapter Eleven.

⁴⁶ Feinberg, *Harm to Others*, above footnote 18 at 37, 54-55 and 216.

⁴⁷ See *Harmless Wrongdoing*, (Oxford University Press, 1988) at 17-20, where Feinberg presents his 'taxonomy of evils'.

features, when combined with his insistence that we must measure a person's start-point and endpoint on a scale that itself has inbuilt levels of welfare states, has forced Feinberg to develop a series of seven complicated distinctions between harm in its ordinary sense and a variety of other kinds of: 'harm'; 'harm₂'; 'harms on balance'; being in a 'harmed condition'; being in a 'harmful condition'; and being in a 'harmed state', which do not help to illuminate or simplify our decisions.⁴⁸ To solve this problem, I would classify as harm any and all kinds of setbacks to interest that make a person worse off, however small and however caused, and keep these questions separate from any further issues as to the minimal threshold standards necessary to human wellbeing, the nature of the causal event, the question of fair attribution for the causing of harm, and any questions of wrongfulness or invasions of rights, as well as the issue of how to respond to harm.

With the exception of three cases which I discuss below, setbacks to welfare interests are generally an uncontroversial form of harm and the link between the positive value that we place on our welfare and the negative concept of harm is indisputable. Negative effects (both tangible and intangible) on our welfare interests are capable of being identified, described and often quantified in straightforward factual terms by comparing our state before and after an event, and, as others have pointed out, these are the kinds of harm that we tend to describe in terms of loss, damage or injury.⁴⁹ As I argued in section 2.2 of Chapter Two, we would also consider ourselves to be worse off, or harmed, if our legitimate expectations in the enjoyment of any of these things was taken away or reduced, or if the position of others with whom we consider ourselves to be in competition was improved unfairly, while we remained in our original position.⁵⁰ We might also consider ourselves to be

⁴⁸ See *Harm to Others*, above footnote 18 at 31-64, especially at 49, for example, where Feinberg explains that while it would not be classified as 'a harm' to torture another person by inflicting great pain upon them via electric shocks and then erasing all memory of the experience with a pill, it 'would count as being a condition of harm, though not in a harmful condition.'

⁴⁹ See Feinberg, *Harm to Others*, above footnote 18 at 32-34; and Kleinig J, 'Crime and the Concept of Harm' above footnote 4 at 32.

⁵⁰ So, for example, we do not consider ourselves to have been harmed by others if we lose in a fair contest that we had freely entered into because in such circumstances we tend to blame fate, or, more often, ourselves for the loss, perhaps because we had not trained properly, or simply because we were just not good enough. However, if our competitors have been given the benefit of dubious

worse off if our employers have singled us out and discriminated against us in promotion processes on grounds of race, gender, disability or sexual preference.⁵¹ Our access to government services provides another example of this kind of harm, because we consider ourselves to be in competition with others for the benefits distributed by the state. This is partly because our understanding of harm and our welfare interests in these cases is informed by the simple desire to get the best that we can for ourselves. However, as we shall see, these assessments of harm also come to be structured around and modified by our desire to be treated by others (and by the state) as a person of equal worth, dignity and value, and here again, we reach a point where the elements of the good life become linked together as our understanding of harm and our welfare interests are affected by our vision of ourselves as equals and of our community as a place where each person is entitled to be treated as an equal. So, if a decision is made which has the effect of denying access to police or hospital services only to some citizens, or which locates these services only in some suburbs but not others, those who lose out might consider themselves to be harmed by these events because their expectations of enjoying these services have been disappointed.

Of course, harm is not the only issue involved in such decisions. There may be other valid reasons why they have been made, and, as we shall see, the presumption of equal treatment that is based on our mutual desire to be counted as equals in the abstract sense sometimes justifies unequal treatment in cases where factual inequality exists. Nor is the effect on our welfare the only factor that is relevant to our characterisation of the conduct of others or the nature of the events that may cause us to be worse off, however, the aim at this point of the analysis is simply to help us to recognise and classify harm of different kinds, however caused, and to be able to identify harmful conduct or events when we see them. Once we move to the second and third stages of the analysis and consider the aspects of autonomy and respect, we

umpiring decisions or some other unfair advantage, we would consider ourselves to have been harmed, not necessarily because we had a desire to win (or even an interest in winning) that was thwarted, but because our legitimate expectation that such contests will be run so as to offer a fair chance to all competitors had been disappointed. Of course, if we had a chance of winning, then such unfair conduct would have an even greater adverse effect and a calculation of the value of the lost chance of winning would also be relevant to our assessment of the harm.

⁵¹ See Epstein RA, 'The Harm Principle and How It Grew' (1995) 45 *University of Toronto Law Journal* 369 at 408-416 for a discussion of other competitive and economic harms.

will be able to extend our understanding of harm, our characterisation of the conduct of others, and the effects upon us of that conduct, by adding to any assessment of the factual, harmful effects of the conduct, a list of the reasons why we might describe the conduct as wrongful or the actor as being at fault. However, at the stage where we are deciding whether to characterise an effect as harmful, we should simply consider whether it has the capacity to make us worse off in any way, either in respect of our actual states, our legitimate expectations, or our competitive positions relative to others, and we should consider as separate issues, any questions relating to the attribution of that harm to the agency of any particular person, or any decisions as to whose responsibility it should be to respond to those various harms.

There are three cases where it has been suggested that adverse effects upon our welfare should not be classified as harmful:⁵² the first is the case of death, where the subject no longer exists; the second is the case of pain, disfigurement, grief and distress, which some have argued are simply disliked states, rather than harms; and the third is the case of some 'status worsenings' like financial losses, loss of reputation, or property loss, which Judith Jarvis Thomson has argued should not be classified as harms.⁵³ The third case is easily disposed of. Thomson's argument about harm takes place against the backdrop of her discussion of the nature of our rights, which, building on Hohfeld's analysis of claims, privileges, powers and immunities, she links with an account of the claims that we have against others.⁵⁴ Accordingly, Thomson's discussion and definition of harm, like Feinberg's, is limited to the kinds of harm that we have a right to be protected from, or harm that has been caused by conduct which is an infringement of a valid claim that we have against others.⁵⁵ So, while Thomson does 'make moral room'⁵⁶ for status worsenings like financial loss and damage to possessions or reputation, she does not classify them as harms because they can sometimes be caused by means that do not involve infringements of valid claims. My test for harm, which is based on the ordinary meaning of the concept, does

⁵² I discuss the fourth controversy over causing offence in section 9.4.

⁵³ Thomson argues that these kinds of 'status worsenings' are not harms in *The Realm of Rights*, above footnote 36 at 266-269.

⁵⁴ Thomson, *The Realm of Rights*, above footnote 36 at 201, summarising an earlier argument at 37-122.

⁵⁵ See Feinberg, *Harm to Others*, above footnote 18 at 215.

⁵⁶ Thomson, *The Realm of Rights*, above footnote 36 at 267.

not include any limits based on the way that the harm has come about, or any requirement that it be caused by an infringement of a claim or an invasion of any right or interest recognised by the law. Consequently, I would classify any financial loss or damage to possessions or to reputation as harmful, and would leave the discussion of the legal recognition or state responses to such harms as a separate issue.

In the case of death, it has been argued that because the subject no longer exists, we cannot say that a person who has died is in any state at all, let alone in a worse state than they were before the event occurred.⁵⁷ I argue that we should classify the loss of life as a harm, despite the fact that one who is dead has no remaining interests in their welfare. While it may be philosophically interesting to debate whether it is logically possible to be 'worse off' once death has occurred, the ordinary person tends to regard death as one of 'the worst' kind of events that can happen. My account of harm (and the criminal law) is based on the value that we as living persons place on the elements necessary to living a good life together with others, and so, even though it may be true that once a person is dead they are 'beyond harm or gain',⁵⁸ I suggest that, because death is generally seen as the complete destruction of everything we value in this world, including our welfare and our autonomy, and, since the having of life is itself a logical condition of living a good life, we can conclude that death is a special case of harm, and perhaps a harm of a unique, foundational, kind. Certainly, the loss of our own life is something that we characteristically treat as a harm to be avoided at almost any cost and we commonly view ourselves as having lost something of great value when those we care for die. Cicero said 'death is shunned as though it involved the extinction of our true nature'⁵⁹ and as Feinberg has pointed out, to extinguish a person's life is to 'defeat almost all of his self-regarding interests'.⁶⁰ For these reasons, I would submit that we do ordinarily regard death as making us worse off and that the criminal law is correct in treating it as one of the most serious

⁵⁷ See Feinberg, *Harm to Others*, above footnote 18 at 79-83, for a discussion of the two different points of view on whether death should count as a harm. Feinberg concludes that death should be classified as a harm. Judith Jarvis Thomson argues at 265 in *The Realm of Rights*, above footnote 36 that death is a 'complete and permanent disability' and is therefore a harm.

⁵⁸ Feinberg, *Harm to Others*, above footnote 18 at 79.

⁵⁹ Cicero goes on to make the point that pain also 'leads to the dissolution of our nature': see *The Laws*, above footnote 16 at 107-108.

⁶⁰ Feinberg, *Harm to Others*, above footnote 18 at 82.

of harms. There are, however, occasions when this objective view of death as a harm is challenged by a person's subjective circumstances, and I will discuss those situations in section 11.3 of Chapter Eleven.

The questions of pain, grief, distress and disfigurement are similar to the issue of death, in that the ordinary person would generally consider themselves to be worse off in terms of their welfare if any of these adverse effects occurred, but for various reasons, philosophers like Joel Feinberg, Joseph Raz and Judith Jarvis Thomson have argued that they should not count as harms.⁶¹ Feinberg argues that these minor pains, hurts and distressing sensations are not harms because they 'come to us, are suffered for a time, and then go, leaving us whole and undamaged as we were before.'⁶² Because Feinberg classifies as harm only those setbacks to interest that are the result of a wrongful invasion of a right, and because he argues that we have neither the right to be protected from such 'unhappy mental states', nor any legitimate interest in avoiding them that can be related to any of our 'ulterior focal aims', he concludes that these 'passing unpleasantnesses' are 'not to be classified as harms.'⁶³

Judith Jarvis Thomson argues to like effect and includes the aspect of disfigurements as another example of status worsenings that are not harms. Like Feinberg and Kleinig, she argues that harm involves an impairment and that 'the gravity of the kind of harm ... turns on the gravity of the impairment it causes.'⁶⁴ Joseph Raz has also put forward a similar argument that is based upon the assumption that harm has a 'forward looking aspect' and that we can classify as harmful only

⁶¹ Feinberg, *Harm to Others*, above footnote 18 at 45-53, 215-216; Raz J, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) at 413-414; 'Autonomy, Toleration and the Harm Principle' in Gavison R (ed), *Issues in Contemporary Legal Philosophy*, (Clarendon Press, Oxford, 1987) 313 at 327-333; and Thomson, *The Realm of Rights*, above footnote 36 at 263-265.

⁶² Feinberg, *Harm to Others*, above footnote 18 at 45.

⁶³ Feinberg, *Harm to Others*, above footnote 18 at 45-46; 215-216. See also footnote 48 above. Although we may have an 'informal' interest in avoiding pain, there is no crime of intentionally inflicting pain on another. Rather, this interest is covered indirectly by crimes that protect our physical integrity, like assault, wounding, etc. However, if a way could be found of inducing excruciating pain from afar without directly touching or invading the body, we could confidently predict that such conduct would quickly be declared to be criminal.

⁶⁴ Thomson, *The Realm of Rights*, above footnote 36 at 263-264. See also discussion beginning above at footnote 54. Kleinig also bases his account of harm upon an impairment: 'Crime and the Concept of Harm' above footnote 4 at 32; see also Feinberg, *Harm to Others*, above footnote 18 at 52-53.

those effects that ‘affect options or projects’ either by depriving ‘a person of opportunities or of the ability to use them’ or by reducing ‘his ability to act in ways that he might desire’.⁶⁵ Raz argues that one harms another when one ‘makes the other person worse off than he was or is entitled to be, *in a way that affects his future well-being*’.⁶⁶ More recently, views similar to Raz’s have been expressed by AP Simester and Andrew von Hirsch, who also limit the scope of harm to those effects that impair a person’s ‘opportunities to engage in worthwhile activities and relationships and to pursue valuable, self-chosen goals’⁶⁷ and by John Gardner who also emphasises that harm is ‘not the pain or lost limb or shock in itself’ but is instead the consequent ‘attenuation of capacity or opportunity for action, reducing the range of alternative actions and activities that are available to the person who is harmed’.⁶⁸

The insistence that adverse effects upon our welfare can be classified as harm only when they impair our prospective ability to use our bodies to act, our minds to think, and our consequent capacity to exercise our interests in autonomy – and not if they cause ‘mere’ pain – places an artificial limit upon the ordinary understanding of harm that I have been attempting to explore in this chapter. The further requirement that these effects relate to an ‘ulterior focal aim’ and must have been caused by a specific kind of human conduct that is an invasion of a right, adds in other elements that I have argued can be better assessed as separate issues. I agree (and will argue in the section that follows) that events which destroy or diminish our ability to exercise our autonomy cause a very significant kind of harm. However, I do not accept that only such effects can count as harm. I argue that in the ordinary course of things we do value both an intact, unblemished body and the absence of pain, grief and distress as

⁶⁵ Raz, *The Morality of Freedom*, above footnote 61 at 413-414.

⁶⁶ Raz, *The Morality of Freedom*, above footnote 61 at 414 (emphasis added).

⁶⁷ Simester AP & von Hirsch A, ‘Rethinking the Offense Principle’ (2002) 8 *Legal Theory* 269 at 281. In this respect von Hirsch appears to place a limit on his earlier account of harm given in ‘Gauging Criminal Harm’ above footnote 18. The difference may be accounted for by the fact that the account in ‘Gauging Criminal Harm’ considered the issue of harm for sentencing purposes and ‘Rethinking the Offense Principle’ considers harm from a legislative point of view. I would argue that the same account should be used for both stages of the criminal justice process.

⁶⁸ Gardner J, ‘On the General Part of the Criminal Law’ in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 205 at 243. See also Gardner J & Shute S, ‘The Wrongness of Rape’ in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 193 at 195.

important and intrinsic parts of the good life which we aim to secure and maintain for ourselves, and suggest that, whether they disable us from action or not, we do regard ourselves as worse off if our lives become blighted, even for a short time, with pain, disfigurement, grief or distress.⁶⁹ In the same way that we value having possessions for their own sake as much as for their instrumental or use value, so we value the absence of pain, grief, and disfigurement as an intrinsic part of our personal welfare, regardless of the separate value that we give to any consequential adverse affect that their presence may have upon our activities and future prospects. Pain is accepted by all of these writers as an adverse effect or evil that we seek to avoid, and I would argue that during the period when we suffer any pain, distress or grief, we do consider ourselves to be worse off than we were before the experience occurred. We can therefore properly classify these temporary effects as harms (albeit small harms),⁷⁰ without necessarily committing ourselves to declaring that any conduct which causes them must consequently be seen as an invasion of a right or is therefore something that the criminal law must forbid and punish. Our responses to these harms may vary, quite legitimately, from our responses to other more significant harms, but these effects are nevertheless harms in the ordinary sense of the word, and it would be a mistake to try to solve other (legislative or philosophical) problems unrelated to the issue of harm by changing our definition of harm and excluding them from our list.

⁶⁹ For example, a disfigurement that falls short of affecting our exercise of our autonomy may nevertheless worsen our self-esteem or affect for the worse the way that others regard us and treat us. For views on the issue of pain, grief and distress similar to mine see: Perry SR, 'On The Relationship between Corrective and Distributive Justice' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 237 at 256; Hörnle T, 'Offensive Behaviour and German Penal Law' (2001) 5 *Buffalo Criminal Law Review* 255 at 268-269; Reaume DG, 'Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination' (2001) 2 *Theoretical Inquiries in Law* 349. For a contrary view (in a tort case over a pregnancy and subsequent birth of a child following a failed sterilisation operation) see Witting C, 'Physical Damage in Negligence' (2002) 61 *Cambridge Law Journal* 189, where it was argued (at 192-194) that because the plaintiff's body returned to her pre-pregnancy state, she should not be seen as having been harmed by the events that led to her unwanted pregnancy.

⁷⁰ In 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1 at 23, von Hirsch and Jareborg accept that psychological harm is a harm, but they do not include it as a separate category within their four categories of harm: see footnote 18 above.

9.3 Autonomy and the concept of harm

The element of autonomy, which comprises our active wellbeing or well-doing, moves beyond the foundational aspect of welfare or passive wellbeing, to include the different kinds of activities that we want to engage in and the choices that we want to make about the kind of life we want to live. By contrast with our welfare interests, which derive from our basic desires to be healthy, secure and well cared for in a material sense, the value that we place on our autonomy derives from our conception of ourselves as unique, self-directed, independent, sovereign individuals and from our desires to control our own destiny by defining for ourselves the nature of the good life that we want to lead and deciding for ourselves when, where and how we will try to achieve it. Autonomy and the linked ideals of freedom (the space within which we may exercise our autonomy), agency (the capacity to choose between options and to act upon those choices) and authenticity (choosing one's own identity and taking responsibility for one's own life by critically reflecting upon one's values and goals)⁷¹ are the foundation of many influential ethical and political philosophical theories, including Kant's moral theory, the liberal utilitarian theories of John Stuart Mill, and the existential theories of Martin Heidegger.⁷² These ideals have also been applied extensively by those who analyse the concept of justice, the nature of law in general, and the criminal law in particular,⁷³ and many definitions of autonomy have been

⁷¹ The concept of authenticity is a feature of the existentialist philosophy of Martin Heidegger: see Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 68.

⁷² A helpful summary of the philosophy of Kant, Mill and Heidegger can be found in Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995): see the entry for Kant at 435-441; Mill at 566-569; and Heidegger at 345-349, and at 68 (on authenticity).

⁷³ The literature discussing the application of these ideals in the legal context is enormous, however, those contributions which I have found particularly illuminating include (in alphabetical order):

Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 28-30.

Becker L, 'Crimes Against Autonomy: Gerald Dworkin on the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 959.

Cane P & Gardner J (eds), *Relating to Responsibility*, (Hart Publishing, Oxford, 2001).

Dan-Cohen M, 'Basic Values and the Criminal's State of Mind' (2000) 88 *California Law Review* 759.

Dubber MD, 'The Right to be Punished: Autonomy and its Demise in Modern Penal Thought' (1998) 16 *Law and History Review* 113; 'Rediscovering Hegel's Theory of Crime and Punishment' (1994) 92 *Michigan Law Review* 1601.

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- Duff RA, 'Principle and Contradiction in the Criminal Law' in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 156; *Intention, Agency and Criminal Liability*, (Blackwell Publishers, Oxford, 1990); *Punishment, Communication and Community*, (Oxford University Press, 2001); 'Harms and Wrongs' (2001) 5 *Buffalo Criminal Law Review* 13.
- Dworkin G, *The Theory and Practice of Autonomy*, (Cambridge University Press, 1988); 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927.
- Dworkin R, *Taking Rights Seriously*, (Duckworth, London, 1977); *Law's Empire*, (Fontana Press, London, 1986).
- Evans J, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97.
- Feinberg J, *Harm to Others*, (1984); *Harm to Self*, (Oxford University Press, 1986).
- Gardner J, 'On the General Part of the Criminal Law' in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 205.
- Griffin J, *Value Judgment*, (Clarendon Press, Oxford, 1996).
- Hampton J, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39 *University of California at Los Angeles Law Review* 1659; 'Liberalism, Retribution and Criminality' in Coleman JL & Buchanan A (eds), *In Harm's Way*, (Cambridge University Press, 1994) 159.
- Hart HLA, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984).
- Honore AM, *Responsibility and Fault*, (Hart Publishing, Oxford, 1999).
- Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988).
- Mill JS, *On Liberty and Other Essays*, (Oxford University Press, 1998) at 16-19.
- Murphy JG, 'Does Kant Have a Theory of Punishment?' (1978) 87 *Columbia Law Review* 509; *Retribution, Justice and Therapy*, (Reidel, Dordrecht, 1979).
- Norrie A, 'Simulacra of Morality? Beyond the Ideal/Actual Antinomies of Criminal Justice' in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 101; *Crime, Reason and History*, (Weidenfeld and Nicolson, London, 1993); *Punishment, Responsibility and Justice: A Relational Critique*, (Oxford University Press, 2000).
- Nozick R, *Anarchy, State and Utopia*, (Basil Blackwell, Oxford, 1974).
- Owen D, 'Philosophical Foundations of Fault in Tort Law' in Owen D (ed), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995) 201.
- Perry SR, 'On The Relationship between Corrective and Distributive Justice' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 237.
- Pincoffs E, *The Rationale of Legal Punishment*, (Humanities Press, New York, 1966).
- Rawls J, *A Theory of Justice*, (Oxford University Press, 1973).
- Raz J, 'Autonomy, Toleration and the Harm Principle' in Gavison R (ed), *Issues in Contemporary Legal Philosophy*, (Clarendon Press, Oxford, 1987) 313; *The Morality of Freedom* (Clarendon Press, Oxford, 1986); *Engaging Reason: On the Theory of Value and Action*, (Oxford University Press, 1999).

suggested.⁷⁴ My account of autonomy, which I have defined as the exercise of control over the conduct of one's own life by defining, choosing and pursuing the good life on one's own terms, is more limited than the accounts offered by those who, following Kant and Hegel, adopt an extended understanding of the meaning and significance of autonomy.⁷⁵ For example, Andrew Ashworth, while not going so far as to argue, like JD Mabbott, that 'retribution is the agent's own act',⁷⁶ or that offenders have a right to, have consented to, or have willed their own punishments,

⁷⁴ Some typical examples include the following:

Gerald Dworkin in *The Theory and Practice of Autonomy*, above footnote 73 at 20, conceives of autonomy as a 'capacity of persons to reflect critically upon their first-order preferences, desires, wishes and so forth and the capacity to accept or attempt to change these in the light of higher-order preferences and values. By exercising such a capacity, persons define their natures, give meaning and coherence to their lives, and take responsibility for the kind of person they are.'

Meir Dan-Cohen, 'Basic Values and the Criminal's State of Mind' above footnote 73 at 765 suggests that the core idea of autonomy is the notion that 'people should be given control over the conduct of their own lives' and should 'have choices in matters that touch them and their lives.' At 315 he warns that it should not be confused with self-realisation, which he defines as 'the development to their full extent of all the valuable capacities a person possesses.'

Joel Feinberg begins his discussion of autonomy in *Harm to Self* (Oxford University Press, 1986) at 28 by suggesting that autonomy has 'four closely related meanings. It can refer to the *capacity* to govern oneself ... or to the *actual condition* of self-government and its associated virtues; or to an *ideal of character* derived from that conception; or ... to the *sovereign authority* to govern oneself which is absolute within one's own moral boundaries' (original emphasis).

Joseph Raz defines autonomy in 'Autonomy, Toleration and the Harm Principle', above footnote 73 at 314, as the 'vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'

John Skorupski, 'The Ethical Content of Liberal Law' in Tasioulas J (ed), *Law, Values and Social Practices*, (Dartmouth, Aldershot, 1997) 191 at 202 defines external autonomy as 'the freedom to make and follow one's own plan of life, within one's sovereign domain, without interference from others' and internal autonomy as 'the power and capacity to form a rational and responsible plan of life, and carry it out without being blown off course by inclination.'

⁷⁵ An account of the application of the ethical philosophy of Kant and Hegel to the criminal law and the institution of punishment can be found in Dubber MD, 'The Right to be Punished: Autonomy and its Demise in Modern Penal Thought' (1998) 16 *Law and History Review* 113 and 'Rediscovering Hegel's Theory of Crime and Punishment' (1994) 92 *Michigan Law Review* 1601.

⁷⁶ See Dubber MD, 'The Right To Be Punished' above footnote 75 at 118, citing JD Mabbott's famous paraphrase of Hegel, found in 'Freewill and Punishment' in Aaron RI & Lewis DH (eds), *Contemporary British Philosophy*, (G Allen & Unwin, London, 1956) 303 (n.v.).

suggests that the principle of autonomy requires 'that each individual should be treated as responsible for his or her own behaviour.'⁷⁷ However, my account of autonomy is based upon what a person might want for themselves as part of living a good life together with others, and, because I doubt that in the ordinary course of things individuals do actually want to be either judged by others or held by others to be accountable for their behaviour (much less be punished for it), I do not extend the concept of autonomy so far as to include any right to or desire for, or consent to being held accountable for our actions. Rather, I would make a distinction between the things that we desire for ourselves (like the right to choose what we want to have and to do) and some of the things that, upon reflection, we might have to accept as flowing necessarily from our desires to live together with others (like limits on our freedoms, being held responsible for our conduct, and a system of state punishment).

It is true that a process of reasoning based on our mutual desire to live a good life together might well justify the construction of a system of laws that involves the imposition of legal sanctions upon certain conduct that interferes with the welfare and the autonomy of others.⁷⁸ But, while our desires might lead us to accept the need for an institution of punishment, it would be a distortion of the notion of desire to read that acceptance as a desire itself. To do so risks transforming state punishment from a contingent necessity, which must be abandoned if any better method of guaranteeing the good life can be found, into something to be actively promoted and gloried in, and from an evil which must be limited into a good to be maximised.

Although we regard both our welfare and our autonomy as valued elements of the good life, the fact that we also want to live together with others who have similar desires which may collide with our own means that no single person is absolutely guaranteed the complete satisfaction of their desires. The compromises necessary for communal living and the scarce supply of the good things that must be shared between us, both result in limits not only on the extent of the protection which the state can give to our exercise of our autonomy but also on the levels of individual

⁷⁷ Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 28. See also Honore AM, *Responsibility and Fault*, (Hart Publishing, Oxford, 1999) at 132-134.

⁷⁸ Examples of 'the argument from necessity' may be found in: Lacey N, *State Punishment: Political Principles and Community Values*, above footnote 18 at 181-185; Griffin J, *Well-Being: Its Meaning, Measurement and Moral Importance*, above footnote 18 at 274-281; and Pincoffs E, *The Rationale of Legal Punishment*, (Humanities Press, New York, 1966).

welfare which the state can provide. So, while our desires may be boundless, our expectations of sovereignty over our own lives are limited. However, bearing in mind that some constraints may have to be imposed upon our actual opportunities to satisfy our desires for autonomy, the range of activities that a person might want to pursue for themselves and which would be included within my definition of the term, extend to include three interlinked aspects which can be classified as autonomy of choice, autonomy of action and autonomy of interaction with others.

The core aspect of our autonomy is the exercise of choice and control over the conduct of our own lives. We want the freedom to decide for ourselves the kind of life we want to lead without being dictated to by others or being impeded in our attempts. We want to decide for ourselves what kind of career to pursue; what kind of family life we want to lead; which religious experiences to seek or to avoid; which recreational activities to try; and what kinds of food we will (or will not) eat. We want to choose whether to travel and explore or whether to retreat from the world and meditate; to choose whether to relax, enjoy and amuse or to agitate, provoke and create; to compete with and frustrate others or to nurture and protect them; and to decide whether to keep things the same or try to bring about change. Some of us may even want to pursue a life that others may disapprove of. John Stuart Mill maintained that 'the only freedom which deserves the name, is that of pursuing the good in our own way' and argued that provided we do not harm others, this requires that 'our fellow creatures' should not impede us even if they 'think our conduct foolish, perverse, or wrong'⁷⁹ and as Joseph Raz has pointed out, a person 'is autonomous even if he chooses the bad'.⁸⁰ We also want to set and pursue our own distinctive goals in our own way even though we may recognise that we cannot necessarily achieve them. For many of us, the pursuit of the good life on our own terms is valuable in itself, even if success is not guaranteed, or even possible.

Although many of the ways of life that we might choose to follow or activities that we might decide to pursue are valued because they will advance our welfare, there are occasions when we value the opportunity to engage in conduct that might actually

⁷⁹ Mill JS, *On Liberty and Other Essays*, (Oxford University Press, 1998) at 17. James Griffin echoes this account in *Value Judgment*, (Clarendon Press, Oxford, 1996) at 117.

⁸⁰ Raz, *The Morality of Freedom*, above footnote 73 at 411. Of course, the state may not necessarily protect these expressions of autonomy, especially if, as Mill pointed out, they cause harm to others.

destroy or retard our own welfare, as objectively understood. For example, we might value as a supremely good thing, an act which sacrifices our own wellbeing either for the sake of others or for the sake of advancing a cause to which we are committed. In extreme cases of great need or danger we might choose to give up our own lives to protect the people we love or to advance our causes. In less extreme cases we might simply value donating our time or resources to some worthy goal or denying ourselves for the sake of our beliefs. By contrast with the examples given in section 9.1, which showed how the different elements of the good life can reinforce each other, these examples illustrate the potential tension that can be generated when our concurrent desires work against each other. We must make choices between the qualitatively different good things in life when our welfare interests conflict with our desire to do what we perceive as our duty, or when the good things that we want to do may make it impossible to have other good things that we might also want to enjoy.

When these incommensurable aspects of the good life point in different directions we are faced with a conflict that is greater than the more everyday conflicts which we face when we must decide between advancing two different threads of our welfare.⁸¹ This individual dilemma is reflected and amplified in the legislative dilemma facing those who must decide upon the 'lexical priority'⁸² between our welfare and our autonomy within the structure of the criminal law and in the administrative dilemmas facing those who must decide upon the distribution of the goods and opportunities that the state must share amongst citizens. John Gardner, who suggests that the value of 'having money, comfort, entertainment, security and so on lies in the service these things do to our having a range of valuable pursuits to choose from' warns against a 'passive' construction of harm and argues that the value that we place upon autonomy, as 'the key ideal of human well-being for our age' is the true source of the

⁸¹ For example, when we are faced with a choice between buying a new car or paying off the mortgage, we would still see our welfare as being advanced whatever choice we make. But when doing something which we regard as valuable for its own sake will retard our welfare, the choice is more difficult because of the incommensurability between having and doing.

⁸² The phrase originates with John Rawls: *A Theory of Justice*, (Oxford University Press, 1973) at 42 and 243-251, and has also been used by Joseph Raz in 'Autonomy, Toleration and the Harm Principle' above footnote 61 at 313 at 332; and David Owen, 'Philosophical Foundations of Fault in Tort Law' in Owen D (ed), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995) 201 at 217-220.

value that we place upon our passive welfare interests.⁸³ Gardner therefore resolves the dilemma by classifying as harm only the adverse effects upon welfare that will reduce the future or prospective exercise of a person's autonomy. However, everyday experience suggests that these two elements of the good life are not always seen as rival values and there is no evidence that we consistently value one of these aspects only because it allows us to pursue the other. Rather, we must accept that there are times when our welfare and our autonomy reinforce each other and that there are other times when they conflict, and an examination of the decisions made in our criminal justice system suggests that our law-makers have not arrayed the two in a rigid hierarchy of value.⁸⁴ I will consider in more detail the pattern of those choices and the priority that our law makers have allocated to the two aspects of welfare and autonomy in Chapter Eleven, where I will also consider the priority given to the role of the third aspect of the good life – the element of equal respect.

Autonomy of choice may be classified into two subcategories: autonomy of action and autonomy of interaction with others. As active beings we want to control our own lives by choosing for ourselves the activities that we engage in, and, as social beings who live together with others, we want to exercise control over when and how we will interact and associate with others. Autonomy of action covers not only the full range of things that we want to aim for (like setting our own goals in terms of success and achievement in education, careers, accomplishments, status, position, power or influence) and the things we want to do (like thinking, writing, working, walking, reading, singing, relaxing, travelling, worshipping, gardening, interacting with animals and with nature, etc) but also extends to include the kinds of things that we

⁸³ Gardner J, 'On the General Part of the Criminal Law' above footnote 73 at 242-243. In his footnote 63 at 254 Gardner criticises Ashworth's and Lacey's accounts of the tension between welfare and autonomy: in Lacey N, *State Punishment*, above footnote 73 at 103-105; and Ashworth A, *Principles of Criminal Law*, 2nd ed, (Clarendon Press, Oxford, 1996) at 24. He suggests that Ashworth moderated his approach in the third edition of *Principles of Criminal Law*, at 28-29.

⁸⁴ I will examine this issue in more detail in Chapter Eleven. See also the references to Ashworth and Lacey in footnote 83, above. Lacey suggests (at 117) that 'it would be foolish to imagine that one always acts as an absolute constraint on the pursuit of the other'. She argues (at 180) that the two are incommensurable political values and points out (at 187) that trade-offs between the two must be made when a community considers both the aim and the distribution of punishment. More recently Lacey has argued that the values of autonomy and welfare are not necessarily in opposition: *Unspeakable Subjects*, above footnote 42 at 52.

want to be able to see, to say and to hear. Our desire to think for ourselves and to express ourselves in both words and actions means that we value freedom of speech, freedom of conscience, freedom of worship and religion, freedom of movement and freedom of access to opportunities for further self-development and self expression. Autonomy of action also includes autonomy of labour, ownership and possession and covers all of the choices that we want to make in the disposition of our labour and in the acquisition, use, control and disposal of the products of our labour like chattels, financial resources and real property.

The value we place on our autonomy of interaction derives from our desires, as social beings, to control the extent and the nature of our public and private contact with others. We want to be able to decide when and how we will interact with others, to choose whether to exclude or embrace them, and to control the access that they may have not only to our bodies and our personal space, but also to our personal lives. The value we place on autonomy in our personal interaction with others reflects our desires for privacy, sexual expression, emotional intimacy and physical integrity, however, we also value our more public, political and business oriented contacts with others. Freedom of contract, assembly and political association are therefore all part of the public dimension of our autonomy of interaction with others.

If an event occurs that either temporarily diminishes or completely destroys our control over our lives or our ability to implement our choices, we do ordinarily consider ourselves to be worse off as a result, and I conclude therefore that these kinds of adverse effects should properly be characterised as harms. Adverse effects on our autonomy, just like setbacks to our welfare interests, can vary in seriousness and can change our lives in both tangible and intangible ways. However, whether they affect the existing exercise of our autonomy, our legitimate expectations of any future exercise of our autonomy, or our position relative to others similarly situated, these harms can affect our lives and our choices significantly for the worse. So, for example, we might consider ourselves to be worse off, or harmed, if our career aspirations or our business ventures are blocked and we cannot pursue the profession of our choice; if our sexual autonomy is denied and others impose their desires upon us; if our doctors treat us against our will; if our religious practices are forbidden; if our lifestyle options are limited or our chosen means of self expression are prohibited.

Setbacks to or intrusions upon our autonomy interests are sometimes described as ‘abstract harms’⁸⁵ to differentiate them from the adverse effects upon our welfare interests which, as we saw above, tend to be described in terms of loss, damage and injury. However, although setbacks to our welfare interests (or passive well-being) are different from setbacks to our exercise of our autonomy (or active well-being), both kinds of harm, whether tangible or intangible, are alike in that both can be ascertained as a factual matter by comparing a person’s actual state, legitimate expectations or competitive position before and after an event and identifying the extent to which they have been made worse off as a result of the event. These harms or setbacks to our exercise of our autonomy exist in the realm of fact and are capable of being assessed in terms of degree and, like the harms or setbacks to welfare described as loss, damage or injury, they too can be described and evaluated in quantitative terms using the adjectives of comparison. Both kinds of assessments are what I have called ‘factual-evaluative’ (as opposed to those which raise moral issues which I have called ‘normative-evaluative’). An event that diminishes our exercise of our autonomy or the degree to which we are able to control our own lives will obviously have a greater or lesser impact upon our lives depending upon the nature and importance of the interest affected and the length of time for which it continues to affect a person for the worse, however, even though these harms may be characterised as ‘abstract’ harms, they can nevertheless lead to devastating effects on a person’s welfare and their future capacities to function,⁸⁶ and I will explore the evaluation of these harms further in Part IV.

The ordinary definition of harm indicates that any negative effect upon or setback either to a person’s welfare or to their autonomy should count as a harm, however,

⁸⁵ See: Alexander L, ‘Causation and Corrective Justice: Does Tort Law Make Sense?’ (1987) 6 *Law and Philosophy* 1 at 4; Cane P, ‘Distributive Justice and Tort Law’ [2000] *New Zealand Law Review* 401 at 403; Smillie J, ‘Certainty and Civil Obligation’ (2000) 9 *Otago Law Review* 633 at 643-644. Tort law is more familiar with the distinction between abstract harms and ‘actual damage’. For example, in relation to the nature of harms caused by sexual assault, see: the judgment of L’Hereux-Dube, Gonthier, McLachlin and Binnie JJ delivered by McLachlin J in the Canadian Supreme Court case of *Non-Marine Underwriters, Lloyd’s of London v Scalera* [2000] 1 SCR 551 at 559-580; and British Columbia Law Institute, *Civil Remedies for Sexual Assault*, BCLI Report No 14, (British Columbia Law Institute, 2001) at viii-x, 13-16, and 37-38.

setbacks to autonomy are a controversial category of harm and not all commentators (even those who emphasise the importance of the role that autonomy plays in our lives and in the criminal law) accept that interferences with autonomy should be classified as harmful. Those who generally agree that a diminishment in a person's prospective or actual capacity to exercise their autonomy should count as a harm include: Larry Alexander, Lawrence Becker, John Gardner, Michael Gorr, Jean Hampton, Stephen Perry, Joseph Raz, Wojciech Sadurski, and Andrew von Hirsch and Nils Jareborg.⁸⁷ By contrast, Andrew Ashworth argues that autonomy contains both factual and normative elements,⁸⁸ and Hamish Stewart argues that interferences with autonomy are not a form of harm, but are rather a form of wrong.⁸⁹ However, the judgment that an act which diminishes a person's autonomy is a wrong, is not of itself a reason for denying that the act may also result in this abstract kind of harm to the

⁸⁶ For example, a victim of a date rape who suffers no physical harm may nevertheless be badly affected emotionally and psychologically for a considerable time.

⁸⁷ Alexander L, 'Causation and Corrective Justice' above note 85 at 4; Becker L, 'Crimes Against Autonomy: Gerald Dworkin on the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 959 at 970-971; Gorr M, 'Some Recent Work on the Philosophical Foundations of Criminal Law' (1996) 15 *Law & Philosophy* 81 at 86; Hampton J 'Correcting Harms Versus Righting Wrongs' above note 23 at 1662; Perry SR, 'On The Relationship between Corrective and Distributive Justice' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 237 at 256; Sadurski W, 'Theories of Punishment, Social Justice, and Liberal Neutrality' (1989) 7 *Law and Philosophy* 351 at 356; and von Hirsch A & Jareborg N, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1 at 19. Nicola Lacey pushes her analysis back one stage to focus not on harms as such but on 'the values and interests whose violation came to be identified as relevant harms', in *State Punishment* (Routledge, London, 1988) at 101. Meir Dan-Cohen emphasises the importance of autonomy but does not specifically consider whether or not a diminishment of autonomy should be counted as harm: see 'Basic Values and the Criminal's State of Mind' (2000) 88 *California Law Review* 759.

⁸⁸ Ashworth A, *Principles of Criminal Law*, above footnote 73 at 28. Ashworth classifies the normative aspect of autonomy as the requirement that individuals should be respected as moral agents. I deal with this normative aspect, in part, under my separate (normative) element of respect.

⁸⁹ Stewart makes this point in his review of the views expressed by Grant Lamond, Peter Alldridge and Antony Duff in 'Book Review: *Harm and Culpability*' (1997) 47 *University of Toronto Law Journal* 407 at 408-409. See also the entry on 'Autonomy in Applied Ethics' in Honderich T (ed), *The Oxford Companion to Philosophy*, (Oxford University Press, 1995) at 10 where it is argued that 'the wrongness of killing depends in part on the fact that to deprive someone of their life is normally to violate their autonomy.'

person who has been thus wronged, and I will explore the relationship between these two different assessments of harm and wrongdoing in more detail in Part IV.

Joel Feinberg gives the aspect of autonomy a critically important role in the legislative decision to criminalise, but, curiously, he does not treat it as a harm in the usual sense. So, while Feinberg acknowledges that a trespasser who takes a 'quiet and unobserved step' onto another's land sets back the owner's interest and 'to that extent therefore harms the interest's owner'⁹⁰ and makes the point that an invasion of a person's interest in liberty and in voluntary action is also a harm,⁹¹ and also argues that the aim of the harm principle is to respect personal autonomy,⁹² he does not treat harm to a person's autonomy as a harm like any other. In what von Hirsch calls Feinberg's 'Standard Harms Analysis'⁹³ Feinberg does not weigh harm to autonomy in the balance along with the other harms to welfare interests. Rather, an interference with autonomy functions instead as a special kind of wrong and so, provided that it fits within certain defined thresholds or 'territorial boundaries' relating to self-regarding 'vital life decisions' autonomy carries a trumping value that confers 'absolute protection' from paternalist interference by others – even if that interference confers on balance a benefit.⁹⁴ It also prevents any setback to a person's interest to which they have consented from being characterised as a 'harm' in the extended sense.⁹⁵ As Antony Duff points out, however, Feinberg's so-called 'small departure' from the harm principle (which allows the criminalisation of coercive paternalism) reveals 'more about the inadequacy of Feinberg's conception of harm ... than it does about the disvalue of infringements of autonomy'⁹⁶ and Duff's suggestion that interferences with autonomy should 'fall squarely within the Harm Principle'⁹⁷ is one

⁹⁰ Feinberg, *Harm to Others*, above footnote 18 at 107 and 35. This conclusion is discussed in Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269 at 284.

⁹¹ Feinberg, *Harm to Others*, above footnote 18 at 35, 78, 217.

⁹² Feinberg, *Harmless Wrongdoing*, (Oxford University Press, 1988) at 12.

⁹³ von Hirsch A, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996) 259 at 261. The standard harms analysis appears in Feinberg, *Harm to Others*, above footnote 18 at 190-193, 216.

⁹⁴ Feinberg, *Harm to Self*, (Oxford University Press, 1986) at 54-55; 78.

⁹⁵ Feinberg, *Harm to Others*, above footnote 18 at 215.

⁹⁶ Duff, 'Harms and Wrongs' above footnote 73 at 29-30; see also 15.

⁹⁷ Duff, 'Harms and Wrongs' at 29. See also Gorr, 'Some Recent Work' above footnote 87 at 86.

that should be accepted. Feinberg's difficulties with the aspect of autonomy are partly related to his summing approach to the issue of harm and his inclusion of the normative aspects of fault and wrongdoing into his extended definition of harm (as a setback to interest that is the result of an indefensible invasion of a right), however, given that I have not adopted Feinberg's definition of harm and that this chapter is seeking to fill out our ordinary understanding of harm, any further analysis of Feinberg's account of the role of autonomy and its relationship with the concept of harm need not be pursued further.

John Gardner and Joseph Raz, who, like Joel Feinberg, maintain that autonomy is of crucial importance in the criminal law, do class such setbacks as harms, but they have qualified their position by imposing a threshold requirement of prospectivity upon the issue.⁹⁸ Raz has argued that one harms another when one 'makes the other person worse off than he was or is entitled to be, *in a way that affects his future well-being*.'⁹⁹ John Gardner, as we saw above, rejects a passive construction of harm and links the notion directly with the idea of autonomy, but, following Raz, he also restricts it to cases where there is some diminishment of a person's future prospects.¹⁰⁰

I would argue that any diminishment in a person's degree of actual control over their own life or their exercise of their autonomy, however minor, should logically be considered as a harm even if it is limited only to a single occasion and has no effect on a person's future capacity. Certainly, the forward looking or future prospects requirement is not dictated by the ordinary meaning of either harm or autonomy, and although we may on occasion wish to limit our legal responses to such 'single event'

⁹⁸ Gardner J, 'On the General Part' above footnote 31 at 242-243; Raz J 'Autonomy, Toleration and the Harm Principle' above footnote 61 at 327-320, and *The Morality of Freedom*, above footnote 61 at 413-415; See above, text at footnotes 65, 68, and 83.

⁹⁹ Raz, *The Morality of Freedom*, above footnote 61 at 414, emphasis added.

¹⁰⁰ Gardner points out that harm is not 'something that happens to one's body or mind, or an unwelcome experience' but is the 'attenuation of capacity or opportunity for action, reducing the range of alternative actions and activities that are available to the person who is harmed' in 'On the General Part' above footnote 31 at 242-243. See also his views expressed in Gardner & Shute, 'The Wrongness of Rape' above footnote 68, which I will discuss below.

harms¹⁰¹ or even in some cases decide that the interference is justified, neither case justifies imposing such a condition or gives any reason to change our understanding of either term. In fact I have argued that a more complete view of autonomy would recognise the value that we place on its two constituent aspects, both of which can be set back or diminished. These two aspects comprise the factual exercise of our autonomy on any given occasion and our general ongoing capacity for autonomous actions. Furthermore, in the light of the fact that a sentence can be adjusted to reflect the degree of seriousness of any single setback to a person's autonomy as well as the degree of consequential harm that may flow from it (whether those consequences affect either the welfare or the future capacity of the victim), there appears to be no functional or logical reason why such a limit is either desirable or necessary in the context of the current enquiry into harm and its place in sentencing law.¹⁰²

For this reason, I disagree with the recent suggestion made by John Gardner and Stephen Shute in 'The Wrongness of Rape' that it is possible to devise an example of a 'harmless rape'.¹⁰³ In the example they give, where an unconscious victim is violated by another and where the crime is never brought to light, I agree with their arguments that the wrongfulness of the conduct lies in the 'sheer use' and 'objectification' of the victim and 'the denial of their personhood',¹⁰⁴ but I do not agree with their assertion that the rape that they have described 'does no harm'. Their conclusion that the victim has not been harmed by the rape is based on their view that harm must have a 'prospective dimension' and their assumption that because this rape remains a secret it cannot affect the victim's future prospects.¹⁰⁵ However, the ordinary meaning of the term suggests that it is not only possible to be harmed either in respect of one's welfare or one's autonomy without necessarily being aware of it, but also that it is possible to be harmed by an interference in one's autonomy without

¹⁰¹ As tort law does, for example, by imposing a conventional sum of nominal damages to mark the court's recognition of the invasion of the autonomy of the plaintiff in cases where a bare trespass has occurred but where no consequential welfare-based damage has followed from the invasion.

¹⁰² Gardner's conclusion can be accounted for by his strong emphasis on an active notion of wellbeing as opposed to a passive one, but purely as a matter of meaning, I can see no reason to prefer the one and deny the importance of the other, and I do not see that our criminal law does this either.

¹⁰³ Gardner & Shute, 'The Wrongness of Rape' above footnote 68 at 196-197.

¹⁰⁴ Gardner & Shute, 'The Wrongness of Rape' above footnote 68 at 205.

¹⁰⁵ Gardner & Shute, 'The Wrongness of Rape' above footnote 68 at 195 and 197.

the requirement that the event must necessarily diminish one's future prospects for action.

In this case the victim's actual control over the access that others have to her body has been denied and diminished, and I would suggest that, viewing the case objectively, we would say that her life had been changed for the worse by that event. Because on that one occasion she had lost the opportunity both to decide what happened, sexually and physically, to her body and to determine for herself the shape of her life, we can conclude that the rape constituted a harm. Given that we have been asked by Gardner and Shute to consider, knowing the facts, whether or not the unknowing victim has been wronged in an objective sense, we are equally entitled to consider whether, objectively speaking, she has also been harmed, and in neither case need we impose any requirement that the victim be aware of the events, or that the events have an adverse effect on her future life. It is enough that her life was in that instant changed for the worse by the event, and changed in a way that she did not choose for herself. This part of the victim's life was imposed upon her by her attacker and to this extent she has objectively been made worse off – or harmed. This conclusion is fortified by the observation that the role of the criminal law is not simply to respond to subjectively experienced wrongs or the subjectively experienced harms that flow from those wrongs, but to make an objective, public, assessment of the event in all its aspects based on the fundamental values that are enshrined in the publicly proclaimed criminal law. Criminal law *is* the external view: it requires an external, public assessment of harm and an external, public assessment of wrongdoing and fault.¹⁰⁶

Gardner and Shute also discuss a case of a 'pure burglary' where someone with keys to another's house steals a pile of old clothes from the attic and gives them to charity. The burglary, like the rape, goes forever undiscovered and again Gardner and Shute describe it as a case of 'the wrong and nothing but the wrong'.¹⁰⁷ Under my account, however, this event, like the rape, would not be classified as a 'harmless wrong' but would be considered to be a harm as well as a wrong because the owner's

¹⁰⁶ See Marshall SE & Duff RA, 'Criminalisation and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7; Simester AP, 'Can Negligence be Culpable?' in Horder J (ed), *Oxford Essays in Jurisprudence*, 4th Series, (Oxford University Press, 2000) 85 at 93.

¹⁰⁷ Gardner & Shute, 'The Wrongness of Rape' above footnote 68 at 201-202.

factual autonomy or control over both the home and the chattels has been denied and diminished. My reasons for characterising this conduct as a wrong, which do not rely upon the fact that the owner's autonomy has been diminished, but upon the fact that we interpret such conduct as a failure to respect the equal worth of the owner, will be explained below. However, my reasons for characterising the event as harmful are based on the fact that the owner's degree of control over his possessions and his ability to decide who enters his home have both been diminished on that single occasion. This applies regardless of whether there is any consequent effect upon the owner's welfare or future exercise of autonomy, however, if there were to be such an effect, that would add to the harm done by the event.

Simester and von Hirsch point out in 'Rethinking the Offense Principle' that the pure case of burglary occurs, strictly speaking, 'when D enters as a trespasser in order to steal but leaves without taking anything'¹⁰⁸ however, even in this latter case I would argue that the event has caused a harm, despite the fact that the event has had no effect on the owner's welfare, because in this case, as in the previous case, the trespasser's act has prevented the owner from deciding what will happen on their own land and has diminished for that time the owner's control over who may enter it. An even more instructive example is given by Larry Alexander who considers the case where one man takes another man's rowboat but leaves enough money to compensate the owner for any conceivable losses.¹⁰⁹ This is an example which exemplifies the paradox of harm and points up the incommensurability between our welfare (or passive wellbeing) and our autonomy (or active wellbeing), because although the owner is clearly no worse off in terms of his welfare, he might well consider himself to be harmed by the event simply because it has diminished his autonomy of possession. Even if we were to add to the case the fact that it was a millionaire who had taken a fancy to the rowboat and that he had left the owner twenty times the value of the boat, it is possible to imagine that the owner might still consider himself to be worse off than before, for example, if the rowboat had perhaps been inherited from his favourite uncle and carried with it cherished memories of happy summer holidays spent messing about together on the river. However, even in cases where there is no

¹⁰⁸ Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269 at 284.

¹⁰⁹ Alexander, 'Causation and Corrective Justice' above footnote 85 at 4.

sentimental attachment to the boat, we could still imagine that any owner might feel worse off in such a case, simply because they had been robbed of the chance to decide how to dispose of their own property. In either case the victim could realistically be characterised as having suffered a loss and in both cases I would argue that a harm has occurred.¹¹⁰ A more telling illustration of the point can be made if we change the facts again so that the millionaire, instead of taking a rowboat, rapes a sleeping victim and leaves her a large sum of money as 'compensation'. In such a case the fact that the conduct was harmful (as well as wrongful) is even more readily apparent.

Beyond the issue of prospective capacity, some of the confusion in these cases of allegedly 'harmless' wrongdoing arises from three complicating tendencies surrounding our debates: the first is the tendency to think only of our welfare or passive wellbeing and to focus only on actual damage when looking for evidence of harm; the second is a tendency to try to overcome the paradox of harm by summing net totals of harms and benefits in order to arrive at a single answer; and the third is the tendency to focus on the aspect of wrongdoing or on the rights violation as a substitute for looking at the ways in which a person might have been made worse off. So, for example, Simester and von Hirsch argue that in a case of a 'harmless trespass' it is a mistake to 'make a purely formal move' and to allow that a 'bare rights-violation' can of itself amount to a harm because 'individuals can always be said to have an interest in not being *wronged*'.¹¹¹ In the light of Andrew von Hirsch's earlier suggestion that an intrusion into a person's privacy or autonomy is one of the 'generic-interest dimensions' of criminal harm¹¹² it is somewhat surprising to see him argue in 'Rethinking the Offense Principle' that a bare trespass or a pure burglary causes no harm, however, while I agree with Simester and von Hirsch's view that a wrong does not of itself amount to a harm to the person wronged (and argued to that effect in section 7.1 of Chapter Seven), I do not agree that it therefore follows that a 'bare trespass' is an example of harmless wrongdoing. A bare trespass may do no actual damage and so leave the owner's welfare interests unharmed, but I have argued

¹¹⁰ For these kinds of reasons, tort law allows for the recovery of the actual chattel in certain cases where damages are not an adequate remedy. See Fleming JG, *The Law of Torts*, 9th ed, (LBC Information Services, Sydney, 1998) at 81.

¹¹¹ 'Rethinking the Offense Principle' above footnote 108 at 285, emphasis added.

¹¹² von Hirsch A & Jareborg N, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1 at 19.

that the factual setback to the owner's autonomy of possession is enough to characterise the event as harmful. This assessment of harm is based not on the fact that the entitlement has been recognised as a right, but on our antecedent desire to possess and to control land and chattels which itself led us to protect our possession of these things by recognising it as a right. The link between the rights violation and the notion of autonomy is very close in possession cases because our understanding of the nature of ownership includes the right to exclusive possession, but in possession cases, as in many others, the reason why we have given ourselves such rights is precisely because of our underlying desire to control our own lives and our desire to protect our vision of ourselves as autonomous, choosing agents.

My point is that in many cases our rights have been created specifically in order to protect our desire for autonomy and in those cases, it is the negative effect on the autonomy of the person who is wronged that is the source of the assessment that harm has occurred, and not the simple fact of the wrong or rights violation itself. In the three kinds of cases discussed above, our pre-existing desire for autonomy and control gives birth to the rights of possession of land and goods and the right to personal physical integrity and sexual autonomy. Once these rights have been given public recognition and the boundaries of the rights have been settled, we gain greater security because the right gives us, in addition to the simple desire, the legitimate expectation that our desires for autonomy, as so defined, will be respected and that within the scope of the right, we can make our own choices about our own lives. So, any invasion of these autonomy-protecting rights can affect us in three ways: the straightforward personal desire for autonomy and control is frustrated; the legitimate expectation that we can exercise our autonomy in the ways provided for by the right is disappointed; and our opportunity on that occasion to make our own choices and to control our own lives that we both desire and legitimately expect is lost. These negative effects can be characterised as making us worse off – or harming us – independently of the separate fact that we might have been wronged and our rights have been violated. On this account, it is not the rights invasion that leads to the conclusion that harm has occurred, nor is the harm 'a legal fiction' as Kleinig has suggested,¹¹³ rather, the conclusion is justified by the actual setback to the person's factual exercise of their autonomy.

¹¹³ Kleinig J, 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27 at 34.

The preceding discussion has shown that interferences which set back a person's exercise of their autonomy can combine in different ways with their welfare interests: some interferences can also adversely affect our welfare; some may make no difference to our welfare; and some may actually improve our welfare. Invasions of autonomy may have consequential effects upon our welfare, just as setbacks to our welfare can sometimes diminish our exercise of our autonomy, and in these cases where both effects are present, we would consider ourselves to have been harmed in two different ways. Just as we value our welfare interests for their own sake as well as for the contribution that they make to our capacity to exercise our autonomy, so too do we give an intrinsic value to being able to pursue our own lives in our own way. This means that even in the most minor cases we can say that when another merely enters our home, or our land, or touches our bodies (but does not damage, hurt or destroy) they have, by that act and on that single occasion, diminished for a time the degree of our factual control over what happens to our life, our land, or our body, and to that extent they have made us worse off. Whether or not we wish to criminalise conduct that causes such abstract harms will depend on other values, in just the same way as our responses to minor harms to our welfare may be subject to other moderating principles, like the *de minimis* principle, for example. However, while there is evidence to suggest that we might be willing to accept that minor setbacks to our autonomy of possession of chattels are not suitable for criminalisation,¹¹⁴ we do ordinarily regard even minor setbacks relating to bodily integrity, sexual autonomy and the privacy of our homes as important candidates for the protection of the criminal law regardless of whether such acts result in any consequential damage or loss in addition to the diminishment of our autonomy.

The application of the test for harm to our interests in autonomy suggests that events that destroy, impede or reduce our exercise of our autonomy (either permanently or on a single occasion) are properly classified as harmful because we do ordinarily consider ourselves to be worse off if we are prevented from doing the things that we want to do. However, while some individuals might consider themselves to be worse off if prevented from doing the things that they want to do, the community might not always agree that such self-identified harms and such self-

¹¹⁴ The additional requirement of 'intent permanently to deprive' may be seen as an application of the *de minimis* principle, for example.

identified aims are worthy of the protection of the law, much less the criminal law. So, just as not all of our desires are socially acceptable, neither are all of our interests in autonomy protected by the state. Furthermore, the state places other qualifications and limits on a person's rights, for example, in cases of children and those without the recognised capacity for autonomy, as we shall see in Chapter Eleven.

Invasions of autonomy that actually improve our state of welfare raise the paradox of harm and point up the incommensurability between our passive and our active wellbeing. However, while the mythical trespasser who builds a luxury cabin on our forest acres rarely troubles the criminal law,¹¹⁵ other cases of paternalistic infringements of autonomy (for example, doctors who treat unconsenting patients by transfusing them against their will) do challenge our understanding of harm, both in private law and in the criminal law. My analysis explains why these cases and those often characterised as 'bare trespasses' or 'harmless wrongs' are properly brought within the scope of the harm principle, and in Chapter Ten we will see that while this account shrinks the field of harmless wrongdoing, it does not eliminate it entirely.¹¹⁶ However, while on my account the two aspects of welfare and autonomy exhaust the categories of harm, it will not be possible to explain fully how these harmless wrongs (or indeed the harmful wrongs) come to be classified as being wrongful until we complete our analysis of the good life and consider the final element of respect.

9.4 Respect and the normative dimension of the good life

The third element of the good life is based upon our desire to be respected by others. We want to count for something within our communities and we want those with whom we share our communities to recognise our innate dignity and to acknowledge our intrinsic value which we see as arising both from our common nature as human beings and our common identity as members of those communities. Throughout history human beings have persistently developed and abided by systems of valuation,¹¹⁷ and we have made no exception for our own selves within those

¹¹⁵ This is based on one of Feinberg's favourite examples of the wrong that improves the victim's welfare; see *Harm to Others*, above footnote 18 at 34-36 and 107; *Harmless Wrongdoing*, above footnote 4 at xxviii.

¹¹⁶ For example, driving while disqualified, while wrongful, would not be classified as harmful.

¹¹⁷ Handy R, *The Measurement of Values*, (Warren T Green, St Louis, 1970) at 93-94 citing von Mering. See also Whitman JQ, 'Ancient Rights and Wrongs: At the Origins of Law and the State:

schemes. In the past we have arrayed ourselves into hierarchies where each person, depending on their particular status in the group, was accorded a different value that was respected by others within the community and which was reflected in the laws, customs and punishment practices of the community.¹¹⁸ However, in modern, liberal, democratic states we see ourselves not as persons of relative value, but as persons of equal value. The element of respect can therefore be refined from that earlier conception to fit our own times, and I will define it for the purposes of this thesis as an attitude which recognises that each human being is entitled to be treated as a person of equal dignity, worth and value.¹¹⁹ This definition highlights two distinct

Supervision of Violence, Mutilation of Bodies or Setting of Prices?' (1995) 71 *Chicago-Kent Law Review* 41.

¹¹⁸ Early law codes are shot through with an awareness of a person's honour and dignity and value, depending on whether the person was a slave, a woman, a free man, a noble of high caste or a king. For the content of tribal law and the early law codes, see: Hoebel EA, *The Law of Primitive Man*, (Harvard University Press, 1954); Attenborough FL, *The Laws of the Earliest English Kings*, (Cambridge University Press, 1922); Robertson JA, *The Laws of the King of England from Edmund to Henry I*, (Cambridge University Press, 1925); Griffith B, *An Introduction to Early English Law*, (Anglo-Saxon Books, Frithgarth, 1995); Cameron J, *Celtic Law*, (William Hodge, London, 1937); Drew KF, *The Burgundian Code* (University of Pennsylvania Press, Philadelphia, 1972), *The Laws of the Salian Franks*, (University of Pennsylvania Press, Philadelphia, 1991), *The Lombard Laws*, (University of Pennsylvania Press, Philadelphia, 1973).

For analysis of these early laws see: Baker J, *An Introduction to English Legal History*, 3rd ed, (Butterworths, London, 1990); Rubin S, 'The *Bot*, or Compensation in Anglo-Saxon Law: A Reassessment' (1996) *Legal History* 17; Stephen JF, *History of the Criminal Law, Volume 1*, (MacMillan, London, 1883); Vinogradoff P, *Outlines of Historical Jurisprudence*, (Oxford University Press, 1920). Ibbetson DJ, *A Historical Introduction to the Law of Obligations*, (Oxford University Press, 1999) at 1-3, 13-17, discusses the role of the concepts of status, honour, and dignity which characterised early and medieval law. He argues that the Roman law concept of *iniuria* emphasised the notion of disrespect or insolence from an inferior to a superior, by contrast with the Germanic conception which he suggests presupposed a relationship between near-equals. However, the Germanic codes did recognise and respond to offences differently, depending on the status and relationship between persons involved, see references in the paragraph above.

¹¹⁹ The literature on the closely related concepts of equality, respect for others, and the recent upsurge of interest in the issue of human dignity is vast, however, I have found the sources in the following alphabetical list (especially those of Jean Hampton) to be of most assistance.

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- von Hirsch A & Jareborg N, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.
- Walgrave L, 'Imposing Restoration Instead of Inflicting Pain' in von Hirsch A et al (eds), *Restorative Justice and Criminal Justice*, (Hart, Oxford, 2003) 61.

aspects of this element of the good life: the first focuses on a person's subjective attitude towards the value of others; the second concentrates on the nature of a person's actual conduct towards others. This reflects the fact that our desire for respect extends beyond a mere wish that others should maintain an attitude of respect towards us, to culminate in a demand that others should treat us in a way that is conditioned by that attitude of respect and is controlled by that vision of our equal value.

The element of respect differs in significant ways from the elements of welfare and autonomy. Whereas welfare and autonomy represent the things that we want *for ourselves* from life in general, being respected as an equal is an attitude that we want to see displayed towards us in the conduct of others. Respect is therefore something that we want *from others* within our community not because it necessarily adds to the range of things that we want to have, and to do, and to be, but because it confirms our vision of ourselves as members of a community of equals who have recognised in each other a mutual desire to be treated as equals. This essentially inter-personal and reciprocal aspect of the good life derives from the fact that as human beings we live together with others in social groups and do not exist simply as individuals. The linked notions of respect for others, of reciprocity between persons, and of the equality and dignity of each person, are not only closely connected with our sense of fairness and justice, but are also based upon our inveterate habit of interpreting the meaning of the conduct of other people, of reading that conduct as evidence of their attitudes and states of mind,¹²⁰ and of re-interpreting the general abstract meaning of their conduct in the light of their particular factual circumstances.¹²¹ The good life for a human being therefore extends beyond the more self-focused aspects of welfare and

Williams B, 'The Idea of Equality' in Feinberg J (ed), *Moral Concepts*, (Oxford University Press, 1969) 153.

Wright R, 'Right, Justice and Tort Law' in Owen D (ed), *Philosophical Foundations of Tort Law*, (Clarendon Press, Oxford, 1995) 159, 'The Principles of Justice' (2000) 75 *Notre Dame Law Review* 1859.

¹²⁰ Donald Brown suggests that the capacity to 'interpret external behaviour to grasp interior intention' and to 'get into the minds of others to imagine how they are thinking and feeling' is a universal human characteristic: see *Human Universals*, above footnote 119, at 134-135. HLA Hart made a similar point in *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) at 182.

¹²¹ See section 3.3 in Chapter Three.

autonomy to include this 'relational' state of being properly treated by others. The three constituent elements of human wellbeing can be contrasted as follows:

Common (but sometimes competitive and conflicting) interests:

- Welfare: *passive* states of wellbeing;
- Autonomy: *active* states of wellbeing, or well-doing;

Common (and reciprocal) desires:

- Respect: a *relational* state of wellbeing which consists of being well treated, or being treated right, *by others*.

Our desires for welfare and autonomy, while common to all, nevertheless represent competitive interests that often collide, partly because our resources are limited but also because one person's pursuit of their desires may be incompatible with a similar pursuit by others. By contrast, our desires for respect are not necessarily incompatible. This is because respect is not a quantitative commodity or the subject of a mutually exclusive pursuit, but an attitude that conditions our conduct. Unlike our welfare and our autonomy, equality is not something that we can maximise, accumulate, or have more or less of depending on the results of the events that overtake us. Although we share a common, general desire for welfare and autonomy, these interests are nevertheless multi-dimensional aspects of the good life that each person values differently, and because they contain so many different, interlinked sub-strands that can be advanced or set back in so many different ways by so many different events, we have to recognise that our individual desires for each of these good things can sometimes conflict and that our demands on one another to have regard to these needs and desires are subject to constant assessment and re-assessment in the light of changing conditions. By contrast, the wish that others should respect us as an equal is a simple, one dimensional and absolute desire, valued equally by all, and our reciprocal demands that others should respect that value are, for the most part, universally shared, non-negotiable and unchanging.

Given that the supply of respect is theoretically unlimited and that we are much closer to agreement on the issue of respect (by contrast with our diverging assessments of the relative importance of the different sub-strands of our welfare and our autonomy), we are therefore not only motivated, but also able, to give our common, reciprocal and absolute desires to be respected as an equal a much greater form of recognition by comparison with the more limited protection that we can give to our common, competitive, conflicting and changing desires for welfare and

autonomy. Furthermore, the element of mutual respect also serves to reinforce the other two elements of the good life: once all members of a community have recognised a duty to respect the equal entitlements of others to pursue their welfare and exercise their autonomy (and the state has accepted the responsibility to enforce those duties), then each person's objective security in those entitlements is enhanced and their confidence in their ability to live together with others is increased.

Each one of these three elements of the good life for human beings gives rise to issues of evaluation but I want to suggest that the element of respect is the only one which directly raises moral or normative questions.¹²² I have already argued in sections 9.2 and 9.3 that the two positive aspects of the good life, our welfare and our autonomy, can be linked to the negative concept of harm. I suggested that both are essentially factual concepts and argued that an event which sets back either the state of our welfare or our capacity (or factual opportunities) to exercise our autonomy can give rise to claims that can be identified and evaluated in quantitative terms by assessing the degree to which a person (or a community) has been made worse off. I want to argue in this section that the positive element of equal respect is a good of a completely different kind, which differs from welfare and autonomy both in its essential nature and in its function in the criminal law. I also want to suggest, both in this section and in the one that follows, that the two distinct aspects of the element of respect, which I have defined as including both a person's attitudes and their conduct, offer us the key to understanding our responses to the aspects of fault and wrongdoing within the criminal law and will argue that it is the element of respect – or more particularly, our characterisation or reading of a person's conduct as exhibiting a lack of respect for the equal value of others – which lies at the heart of our moral or normative assessments that any such conduct should be regarded as criminal wrongdoing and should be punished by the state.

If we begin by applying the definition of harm (as the negative effect of an event that renders a person worse off) to this element of the good life, it seems that conduct which we characterise as failing to respect the equal value of others cannot, of itself and for that reason alone, make us worse off. Because our shared vision of ourselves as persons of equal dignity, worth and value refers to our worth in the abstract moral

¹²² The normative link is suggested in the connotation of 'right treatment' that is contained within it and which goes beyond the more basic, non-normative, notion of being well treated.

sense and because that worth exists in the realm of value, I conclude that nothing that any person can do in the world of facts can diminish that intrinsic value or take that shared community vision of our inherent dignity away from us.¹²³ By contrast, Jean Hampton and a number of other commentators have suggested that conduct which does not respect the value of others should be interpreted as a harm or injury, albeit one of a special ‘moral’ nature.¹²⁴ However, I argue that the element of respect is better seen as being linked to the concepts of fault and wrongdoing rather than harm, damage or ‘diminishment’ and I would suggest that Hampton’s account, which is designed to give a corrective twist to her retributive theory of punishment, should be interpreted as yet another example of a metaphor being taken too far in the search for a neat, unifying explanation of the criminal law.¹²⁵

¹²³ Jean Hampton explains Kant’s distinction between a person’s moral worthiness (an aspect in which he thought that we are likely to be unequal) and a person’s intrinsic moral worth as a rational and autonomous person – or as an ‘end-in-himself’ (an aspect in which he thought all are equal) in ‘Correcting Harms’ above footnote 119 at 1667-1668.

¹²⁴ Hampton argues in ‘Correcting Harms’ above footnote 119 at 1670-1679 that conduct which fails to respect the value of the victim inflicts not only a moral injury but also constitutes actual harm or damage to the victim because it damages either that person’s ‘realisation’ of their value or ‘the acknowledgment’ of the victim’s value. See also Meir Dan-Cohen ‘Basic Values’ above footnote 119 at 773, discussing ‘dignitary harm’; Stephen Garvey, ‘Punishment as Atonement’ above footnote 119 at 1821; Denise Reaume, ‘Harm and Fault in Discrimination Law’ above footnote 119 at 362, who maintains that ‘harm must be understood to inhere in the denial of respect, *per se*’ and that ‘harm to dignity is better understood as an independent, objective harm, not a matter of hurt feelings’; and von Hirsch A & Jareborg N, ‘Gauging Criminal Harm’ above footnote 119 at 20, who also suggest that ‘one is worse off when treated in a degrading fashion’.

¹²⁵ Hampton begins her account in ‘Correcting Harms’ above footnote 119 at 1666 by referring to the way that ‘a retributive response is a way of “repairing” this kind of injury’ but by the end of the paper at 1698 and 1699 the scare quotes have disappeared and she suggests that the ‘real contrast between corrective and retributive justice is not that the former is compensatory whereas the latter is not, but rather that each compensates a different form of damage.’ She suggests that corrective justice ‘compensates victims for harms, whereas retributive justice compensates victims for moral injuries’ that ‘deserve to be repaired.’ As will become apparent, I agree with Hampton when she suggests that wrongdoing is conduct which is read as bearing a message of disrespect for the value of others (see ‘Correcting Harms’ at 1666, 1670, 1677) but I do not go so far as to characterise the effects of that kind of conduct as any kind of factual harm or damage, nor do I accept that this ‘damage’ can justify a retributive response, as Hampton does. See also my discussion of Hampton’s account of the notion of injury in section 6.3 of Chapter Six.

The examples of domestic violence and child sexual abuse certainly show that being treated with disrespect may have the effect of causing a person to doubt their own worth, and, if those mistaken beliefs subsequently lead to destructive mental and emotional states in the victims, we would characterise any detrimental effects on their welfare or their capacity for autonomous action as being harmful. In such cases, however, we would not, as a community, judge that the victims' inherent value or moral worth as a person had actually been diminished or affected for the worse by their victimisers' conduct.¹²⁶ So, while our desire to be respected by others as persons of equal value can sometimes be ignored by those who act as if their victims have no value, and while disrespectful conduct can sometimes harm us if it also sets back our interests in welfare or autonomy, the nature of our beliefs about our own intrinsic worth appears to rule out any conclusion that our actual status either as a person of equal value or as an equal member of the community (and our entitlement to be respected as an equal which flows from that status) can ever be intruded upon, set back, or harmed, either by the conduct or by the attitudes of others.¹²⁷

My point is that while it is possible to be harmed by conduct that does not respect our equal value, that harm nevertheless falls to be classified under the aspects of welfare and autonomy, and any conduct that gives rise to such harms can theoretically be dealt with under the harm principle. But, even though disrespectful conduct can sometimes be harmful, the fact remains that we do not classify it as harmful *because* it is disrespectful – just as we do not classify conduct as disrespectful because it may be harmful. The latter conclusion is based wholly on our perception that the other person has failed to recognise our equal value, and in truth, it is not the effect of the conduct that we respond to in these cases; rather, what we object to is the message that we read into the conduct and the very fact that the conduct happened at all.

¹²⁶ By contrast, Hampton at 1673 and 1674 in 'Correcting Harms' above footnote 119 categorises an 'appearance of degradation' as diminishment, 'which we "read off of" the effects of immoral behavior.'

¹²⁷ Hampton distinguishes the Christian view of 'strong permanence' which posits that 'human value can be neither degraded nor destroyed' even after death from the Kantian view of 'weak permanence' which allows 'the idea that human value can be destroyed, but never degraded by immoral actions' in 'Correcting Harms' above footnote 119 at 1673. Only the second notion of human value is of relevance to the criminal law.

Disrespect is an attitude towards the value of others that we read into human behaviour or find in a person's actual state of mind, and, contrary to Hampton's assertions that the effects of wrongful behaviour which give rise to an 'appearance of degradation' do constitute damage, harm or 'diminishment',¹²⁸ I have suggested that the locus of the deviation or the disvalue that we detect in these cases is not found in any adverse factual consequence that the conduct or the attitude may cause. Rather, our characterisation of someone's conduct as a failure to respect the value of others is of the same kind as our interpretation of wrongdoing as conduct that deviates from a rule thought to be right and our assessment that a person is at fault because their responses to their circumstances have deviated from those that are thought to be right. Each of these conclusions represents our perception of a negative deviation in a purely normative sense and, as I explained in Chapter Three, this kind of deviation exists in a different dimension altogether – in the realm of meaning and moral affect

¹²⁸ See references in footnote 126 above. Hampton's attempt to find some kind of factual effect or quantitative damage or diminishment actually caused to the victim by the conduct that fails to respect the value of the victim (and which must be 'corrected' or 'repaired' by retributive punishment) sabotages her understanding of the nature of wrongdoing and leaves her open to criticism from RA Duff and Matt Matravers that her account is circular and no different from the 'fair play' theory of punishment: see Duff RA, 'Penal Communications: Recent Work in the Philosophy of Punishment' in Tonry M (ed), *Crime and Justice: A Review of Research, Volume 20*, (University of Chicago Press, 1996) 1 at 36-41; Matravers M, *Justice and Punishment*, (Oxford University Press, 2000) at 75-81. My account does not make the same claim, and while I agree with both of these commentators' criticisms of Hampton's attempts to find some kind of factual harm caused by conduct that does not respect the value of others, I will argue in section 10.2 in Chapter Ten that my account, which is more limited than Hampton's, is not open to the same criticism. The key to our differences lies in the fact that I see the element of respect as being linked only to the normative or affective aspect of wrongdoing in an abstract sense and not to any factual aspect of harm, and so while I do argue in this chapter and in Chapter Ten that our interpretation of certain conduct as a failure to respect the equal value of others is 'constitutive of its wrongness' (Duff at 37) it is the fact that the conduct is characterised as a failure of respect which is important and not the factual 'appearance of diminishment' that may or may not flow from that conduct. As I explain, this objective view of an offender's conduct as a failure to conform with a standard which requires each person to respect the equal value of others (that arises from our shared nature and equal status as human beings and our shared identity and equal status as members of the community) does account for the moral basis for our decisions to declare conduct to be criminal wrongdoing. However, it is not always the case that there is an actual appearance of diminishment or an effect that prevents a victim from realising her value (as Duff points out at 37.)

rather than the world of factual effects. A failure of respect, just like the cases of wrongdoing or fault, is detected not by comparing the state of something before and after an event (or as Hampton would have it, by comparing an appearance of diminishment with the underlying truth) but by contrasting the actual conduct or the attitude that *did* occur with the conduct or attitude that we think *should* have occurred in the circumstances as we see them. In each of these cases – of conduct or attitudes that are seen as disrespectful, of conduct that is seen as wrongful, and of attitudes that are seen as faulty – the deviation from that which is thought to be right is not assessed and expressed as a matter of degree, but is recognised in the affective dimension and is asserted as an absolute normative conclusion.

If another person acts in a way that manifests a lack of respect for our inherent value, we do not see ourselves, our worth, or our actual entitlement to be treated properly, as having been touched at all, rather, we judge the other person's attitudes and their conduct as having fallen short of a standard. We justify these normative conclusions, not because we have discovered anything that resembles the kind of negative factual shift along a continuum ranging from better off to worse off that we identify in a case of harm, but because we have discovered a complete mismatch or lack of fit with a set paradigm which can be expressed only in absolute, black or white, all or nothing terms.¹²⁹ Furthermore, when we inquire into cases of fault, wrongdoing, or disrespectful conduct or attitudes, the answer that we seek must be either yes or no, guilty or not guilty. Unlike the case of harm, where two correct but apparently contradictory answers are often needed to capture the full descriptive truth of an event,¹³⁰ these normative questions must yield only one single answer because

¹²⁹ As Vinogradoff pointed out, when we make decisions about crime, wrongdoing and social justice we hold 'the accused in a vice and must direct him either to the right or to the left.' Vinogradoff P, *Outlines of Historical Jurisprudence*, (Oxford University Press, 1920) at 35. However, as I pointed out in section 3.2 of Chapter Three, while conduct is seen as either completely right or completely wrong, it is nevertheless possible to compare and rank cases of wrongdoing in terms of gravity or seriousness by comparing the relative value we place on the factual objects that are protected by the rule that has been breached. But we do not determine the gravity of the case by measuring how far the conduct has deviated from the norm, instead, we assess the seriousness of the breach by reference to the values that sustain the object(s) of the rule's protection: see Chapter Twelve.

¹³⁰ See my discussion of the paradox of harm in sections 2.2 and 2.3 of Chapter Two. A single event can give rise to both benefits and burdens, for example in the mixed blessing case of 'Amputation Rescue' (where the victim's arm was amputated in order to save his life, Table 2.3) and in the

we cannot accept that it is logically possible for an act to be both right and wrong, or respectful and disrespectful, at the same time. The issue is not whether we can measure how far the conduct has deviated from the norm, but simply whether, considered in all the circumstances, it conforms with what we think is right.

This discussion suggests that the element of respect should be seen, not as a part of our assessments of harm, but as a separate qualitative and normative aspect of the good life which is to be evaluated by reference to our interpretation of the meaning of a person's conduct and our perception of the specific attitudes of the person whose conduct is under question. In such matters we are guided by our moral sense that the line dividing proper from improper (or respectful from disrespectful) conduct has been crossed and while we may be insulted, annoyed, disgusted, outraged, or offended by such treatment, these negative effects on our emotions do not themselves amount to harm because we do not actually see them as making us worse off.¹³¹ In fact, Judith Jarvis Thomson has suggested that 'we all quite enjoy' the experience of moral indignation or offence.¹³² Joel Feinberg has argued that the causing of offence may in some circumstances offer separate moral grounds for criminalising conduct, but Feinberg's test of offence, like Lord Devlin's test of disgust 'tends to be a little

bleeding in disguise case of 'Taxi Driver' (where the accident which caused the passenger's injuries prevented him from catching a plane that later crashed, killing all aboard, Table 2.4).

¹³¹ Unlike the cases of welfare, autonomy and respect, which have given rise to much debate, there appears to be a universal agreement that causing offence does not amount to harm and cannot therefore be criminalised under the 'harm principle'. See Alexander L, 'The Philosophy of Criminal Law' in Coleman J & Shapiro S (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford University Press, 2002) 815 at 854-864, and 'Harm, Offense, and Morality' (1994) 7 *Canadian Journal of Law and Jurisprudence* 199; Feinberg J, *Harm to Others*, above footnote 18 at 49-50, 216 and *Offense to Others*, (Oxford University Press, 1985); Greenawalt K, 'Legal Enforcement of Morality' (1995) 85 *Journal of Criminal Law & Criminology* 710 at 711; Hörnle T, 'Offensive Behaviour and German Penal Law' (2001) 5 *Buffalo Criminal Law Review* 255; Mill JS, *On Liberty*, above footnote 119 at 93; Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269; Thomson JJ, *The Realm of Rights*, (Harvard University Press, 1990) at 251; von Hirsch A, 'The Offense Principle in Criminal Law: Affront to Sensibility or Wrongdoing?' (2000) 11 *Kings College Law Journal* 78.

¹³² Thomson, *The Realm of Rights*, above footnote 131 at 251 goes further than John Stuart Mill, who simply argued that 'mere distaste is not an injury', see *On Liberty*, above footnote 119 at 93.

too zealous in its moral work',¹³³ and although I have argued that the normative concepts of wrongdoing, fault and respect have an affective dimension, it cannot be the case that any and all of our negative emotional responses can properly be taken as reliable guides to our punitive responses in the criminal law. Despite the fact that we sense these deviations in the affective or normative dimension, it is not the actual experience of those feelings that we are trying to protect ourselves from when we legislate the criminal law, and the mere fact that another person's conduct or attitudes have given rise to these emotions within us is not enough, of itself, to justify punishing them. When, as a community, we take the step of punishing an offender, the decisive issue is not the fact that we do not like their attitudes or their conduct, but the reasons that we give to explain why we do not approve of them and the underlying value system which we call upon to justify those reasons.

The problem with punishing purely offensive, but not otherwise harmful, conduct arises from the fact that the good life is not necessarily one that is free from the emotions,¹³⁴ and this sentiment applies as much to our negative emotions as to our positive ones. At the basic level our feelings guide our behaviour and inform our norms of conduct as we try to avoid the things that cause the sensations of pain, fear, surprise, anxiety or disgust and attempt to pursue the things that give us pleasure, satisfaction and happiness. Likewise, at the social level, our affective, normative or

¹³³ Bernard Harcourt 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109, at 127 in his footnote 56 cites William Ian Miller's comment from *The Anatomy of Disgust* (n.v.) at 181. The debates over the issue of 'offence to others' are too wide-ranging to pursue in this thesis (especially given that no-one has actually argued that causing offence is harmful) however, using the causing of offence as a separate category which justifies criminal sanctions is highly problematic for it not only spreads the net too wide, but, because it is so subjective and variable, it gives no guidance as to where we should draw the line. Furthermore, the aspect of offence overlaps too much (and too often) with both harm-doing and wrongdoing to be useful as a separate category justifying the imposition of criminal responsibility, a fact which Feinberg's careful choice of events on his famous bus ride in *Offense to Others* (at 10-13), which did not include such examples as rape, violence or murder, managed to sidestep. My model keeps the objects of the law's protection separate and any aspects of the conduct that may cause offence can be dealt with legitimately under the assessment of the aspect of wrongdoing – or the social meaning – of the conduct (which has itself been criminalised on these other grounds).

moral senses guide our intuitions and our conduct as we also try to avoid situations that cause us shame, guilt, embarrassment, humiliation, envy and jealousy and seek out occasions where we feel love, approval, gratitude and pride.¹³⁵ The ability to detect and to respond to these feelings and to the events that give rise to them is crucial, not only to our survival, but also for our knowledge and understanding of ourselves and, because it is what we feel and think, as much as what we do, that makes us the kind of people that we are, it is important that we should not try to shield ourselves from these experiences or these sources of self knowledge. However, the way that we respond to the world and to those around us has three components: the emotional, the intellectual and the behavioural, and, while our feelings and emotions are important, they are not necessarily more important than our intellectual responses when it comes to guiding our behavioural responses.¹³⁶ We have much more in common than the capacity to feel or to experience emotions, and, as I will argue in the next section, our common nature as thinking, rational, embodied and social beings suggests that our feelings of anger, offence, hatred and resentment must be moderated by reference to these other, equally important, shared attributes which give rise to our joint commitments to justice, fairness, rationality, consistency, and our belief that it is right to treat like cases alike.

¹³⁴ Martha Nussbaum examines the debates between Plato and Aristotle on the emotional content of the good life in *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, (Cambridge University Press, 1986).

¹³⁵ See section 2.4 in Chapter Two (and references therein) where I discuss the difference between the social and the basic emotions. See also references in footnote 19 above, and Bentham J, *An Introduction to the Principles of Morals and Legislation*, above footnote 18.

¹³⁶ Richard Posner has argued in *The Economics of Justice*, (Harvard University Press, 1981) at 1-2 that only the intellectual responses (reason) should count and that emotion is not relevant to any calculations of utility. For a slightly different view of the relevance of our 'tastes' for justice, revenge, etc, to welfare economics, see Kaplow & Shavell, 'Fairness versus Welfare' above footnote 119. While they argue that social policies should be assessed entirely on the basis of their effects on individuals' well-being, they also accept that if individuals give a value to or have a taste for the satisfaction of these desires, then they should be taken into account. Others, like Dianne Whiteley, for example in 'A Theoretical Framework for Taking Harm Done into Account in Sentencing' (1999) 2 *Ethics and Justice* 109, tend to report our shared feelings or intuitive responses to events and suggests that these feelings, on their own, are enough to justify our punitive responses. See also Rawls J, *A Theory of Justice*, (Oxford University Press, 1973) at 93: 'the good is the satisfaction of a rational desire.'

Dan Kahan and Martha Nussbaum have suggested that we should adopt an evaluative (as opposed to a mechanistic) conception of the emotions and, like Jeffrie Murphy, they hold that our emotions are not only directed towards objects of significance or value, but that they express cognitive appraisals based on our beliefs.¹³⁷ Consequently, they have argued that these appraisals and the beliefs that lie behind our emotional reactions can themselves be morally evaluated. The difficulty lies, however, in finding solid ground upon which to base these evaluations, but I want to suggest that we should approach the task of evaluating our emotional and affective responses to the conduct of others in the same way that we should approach the task of evaluating their conduct's harmful effects – by looking to our own nature, our conception of the good life and the relative importance that we place on each of its consistent elements.

I have argued that our community's vision of the good life for human beings contains both factual and normative dimensions and suggested that our normative perceptions that another person has failed to respect our equal value can be linked directly with the normative aspects of wrongdoing and fault in the criminal law – in just the same way that our factual assessments of the negative concept of harm are informed by the positive value that we place on the two factual elements of welfare and autonomy. In the next section I will consider in more detail how our desire to be treated with respect can be used to give normative content not only to the abstract, but empty, concept of wrongdoing (by linking it to the social meaning of a person's conduct as carrying a message of disrespect for the equal value of others) but also to give specific content to the particular aspect of fault (by linking it with the actual attitudes towards the value of others that lie behind a person's subjective responses). However, before moving on to consider the links that can be made between the three elements of the good life and the three aspects of a crime, I will draw together, in Table 9.1, the conclusions that I have made in sections 9.2, 9.3, and 9.4 about harm and the elements of the good life.

¹³⁷ Kahan DM & Nussbaum MC, 'Two Conceptions of Emotion' above footnote 119 at 273-289. They explain that a mechanistic conception of the emotions 'sees emotions as forces that do not contain or respond to thought'; Murphy J, in 'Introduction' to *Forgiveness and Mercy*, above footnote 119 at 5. See also the references to Robert Solomon, Susan Bandes, Toni Massaro, Austin Sarat, Melvin Lerner and Samuel Pillsbury in footnote 19 in Chapter Eight.

TABLE 9.1 THE ELEMENTS OF THE GOOD LIFE

WELFARE Having and Being	AUTONOMY Choosing, Doing and Achieving	RESPECT Counting as an Equal
<p>1. DEFINITION</p> <p>The welfare factors include all those things, both internal and external to the person, that are important to human existence.</p> <p>2. FOCUS (factual)</p> <p>Passive states of well-being.</p> <p>3. BASIS</p> <p>Welfare interests are based on our human needs for:</p> <ul style="list-style-type: none"> • physical, emotional and mental health; • possessions and wealth; • reputation; • social support; • community institutions, eg, educational, medical, political, judicial, financial, cultural, etc; • a safe and secure physical environment. <p>4. SIGNIFICANCE</p> <p>A person's welfare can be adversely affected or set back by the conduct of others.</p> <p>Because we see these setbacks as making us worse off they give rise to factual claims about the degree of harm done.</p>	<p>1. DEFINITION</p> <p>Autonomy is the exercise of control over the conduct of one's own life by defining, choosing and pursuing the good life on one's own terms.</p> <p>2. FOCUS (factual)</p> <p>Active states of well-being or 'well-doing'.</p> <p>3. BASIS</p> <p>Our interests in autonomy are based on our human desires to:</p> <ul style="list-style-type: none"> • define the good life for ourselves; • to choose when, where and how to pursue it; and • to succeed in that pursuit. <p>An autonomous life comprises both:</p> <ul style="list-style-type: none"> • the capacity, and • the factual opportunities for decisions and action. <p>4. SIGNIFICANCE</p> <p>Our opportunities and/or our capacity for autonomy can be adversely affected by the conduct of others.</p> <p>Because we see these setbacks as making us worse off, they give rise to factual claims about the degree of harm done.</p>	<p>1. DEFINITION</p> <p>Respect is an attitude which recognises that each human being is entitled to be treated as a person of equal dignity, worth and value.</p> <p>2. FOCUS (normative)</p> <p>A relational state of being treated right by others.</p> <p>3. BASIS</p> <p>Our wish to be respected by others as persons of equal value is based on:</p> <ul style="list-style-type: none"> • our belief in the equality of all human beings; • our commitment to justice, fairness, reciprocity, and treating like cases alike; • our human tendency to interpret the meaning of the conduct of others and to respond to the attitudes towards us that we read into that conduct. <p>4. SIGNIFICANCE</p> <p>A person's inherent worth cannot itself be harmed, intruded upon or affected either for the worse or the better by the disrespectful conduct of others.</p> <p>Disrespectful conduct gives rise to normative, qualitative claims about fault and wrongdoing.</p>

9.5 Making connections: crime and the good life

Nicola Lacey suggested in *State Punishment* that before we can understand the criminal law we need first ‘to understand how it comes to be that certain things are recognised as harms’.¹³⁸ I have argued that before we can construct a model of the criminal justice decision making process, we need not only to be able to recognise harm, but we also need to be able to recognise (and distinguish between) the two aspects of wrongdoing and fault as well and in section 7.6 of Chapter Seven I ended a lengthy investigation into these three concepts by adopting the following definitions:

- **Harm** (a factual concept):

Harm is the adverse effect of an event that makes someone or something worse off than they were before the event.

- **Wrongdoing** (a normative concept):

Wrongdoing is conduct (either an act or an omission) that deviates from a rule, norm or standard of conduct thought to be right.

- **Fault** (a normative concept):

A person is at fault if their individual responses to their circumstances are not as they should be (ie, if their responses deviate from those that are thought to be right). A person’s responses may be manifest in conduct, attitudes or intentions.

However, while these definitions which are based on the ordinary meaning of these terms have helped us to understand the nature of harm, wrongdoing and fault, this expanded understanding has not allowed us to solve all of the problems associated with these three crucial concepts. In particular, it has not led us to any kind of litmus test that will help us to justify our decisions to declare conduct to be criminal. By contrast with the definition of the factual concept of harm, which contains a test that shows us how to recognise harm that can be applied in all circumstances, both inside and outside the criminal law, the definitions of the normative concepts of wrongdoing and fault yield no guidance as to the content of the criminal law beyond the direction to consider the fact of our own moral opinions. And, as we saw in previous chapters, our chances of reaching agreement on a moral or ethical theory of value that will tell us what is right and what is wrong appear to be slim.

To resolve the problem posed by these open and factually empty concepts of crime, wrongdoing and fault, I have suggested that we should abandon the search for

¹³⁸ Lacey, *State Punishment*, above footnote 83 at 101.

a theory of ethics and focus instead on the actual things that we have in common by analysing our own nature and the values that we currently share (as opposed to the conflicting theories of punishment that have been advanced by philosophers of the criminal law). Consequently, in the last three sections of this chapter, I applied the test contained in the definition of harm to the three elements of the good life to see whether we see ourselves as being made worse off if the conduct of others causes a negative effect upon any of these things that we appear to value most. I concluded that we do see ourselves as being made worse off if events occur that have a negative effect upon our welfare and our autonomy, but I argued that, because it exists in the realm of value and not in the world of facts, our vision of ourselves as persons that are entitled to be respected as beings of equal dignity, worth and value, cannot be set back, or harmed, by the disrespectful conduct or the attitudes of others.

I argued instead that this normative and relational element of the good life, which includes two distinct aspects encompassing both a person's attitudes towards the value of others and their conduct towards them, is a good of a very different kind and I suggested that it may hold the key to giving some content to the two normative but factually empty concepts of fault and wrongdoing. I argued that just as we could fill out our understanding of the harm done by a crime by linking it with the value that we place on our welfare and our autonomy, so too could we enlarge upon our understanding of the normative aspects of a crime – wrongdoing and fault – by linking them to the positive value that we place on being respected by others as an equal. In this section of the thesis I want to expand upon this suggestion and see if it is possible to make these links between our positive vision of the good life for human beings and our understanding of the three negative aspects of a crime. In Part IV, I will move beyond this theoretical account of the criminal law and test the descriptive validity of the links that I have made by considering whether they can explain the actual content of our current criminal laws and our current criminal justice practices. I will also consider whether there is any pattern in these decisions that will reveal the relative priority that we have allocated to these linked elements of crime and the good life.

Making a link between the negative concept of harm and the positive good life elements of welfare (our passive states of wellbeing) and autonomy (our active states of wellbeing, or well-doing) is not difficult because these three concepts are alike in so many ways. Welfare and autonomy, like harm, are both factual, multi-dimensional

concepts that are made up of many different strands; adverse effects upon either element can be expressed, like harm, in relative terms and described as a matter of degree; and our emotional responses to any adverse effects on either our welfare or our autonomy are to be found in the same basic (as opposed to the social) emotions that underpin our responses to harm.¹³⁹ The extensive discussion in sections 9.2 and 9.3 suggested that any adverse effects upon either of these elements of the good life are recognised as harmful and I conclude that we can expand upon our understanding of harm's role in the criminal law by recognising that it may be constituted by any adverse effects upon or setbacks to any of the passive or the active states of human wellbeing. The connection between the factual aspects of a crime and the good life therefore yields a more complete understanding of harmful conduct which is informed by our perception that it has made us worse off in terms of the good things that we desire for ourselves, namely, our welfare or our capacity or factual opportunities to shape our own lives, to control what we do, and to decide what happens to us.

In comparison with the connection between harm and the good life elements of welfare and autonomy, the connection between the element of respect and the aspects of fault and wrongdoing is less obviously made. We can begin, however, in the same way that we proceeded above, by noting the similarities between these three concepts. I have argued that our desire to be respected by others as an equal, like the concepts of wrongdoing and fault, leads us to assess the normative quality of the attitudes or conduct of others and to compare them with the standards or norms of conduct or attitudes that we think are right. Any deviations from the standards that we expect from others in relation to each of these three aspects are detected in the normative dimension of meaning and value; our conclusions are expressed as absolutes requiring one single answer which cannot be described as a matter of degree; and our responses to any such deviations are informed by the social, rather than the basic, emotions.¹⁴⁰

I have suggested, therefore, that our understanding of the two concepts of fault and wrongdoing can be linked to the two distinct aspects of the element of respect, and the absolute, black and white, single answer, one dimensional and normative nature of the concept suggests that it may be well suited to filling the rule making function that the criminal law needs. However, while the idea that wrongdoing is in some way

¹³⁹ These features of harm were summarised in Table 4.1 in section 4.1 of Chapter Four.

¹⁴⁰ These features of wrongdoing and fault were summarised in Tables 4.1 and 4.2 in Chapter Four.

connected to respecting the value of others has featured in many accounts of crime and wrongdoing,¹⁴¹ it is true to say that, on its own, the simple desire for respect from others is not enough to justify giving such an important role to this element of the good life. It is only when we connect our reciprocal desires for respect from others, first with our belief that all human beings are by nature equal and then with our deeply held emotional, moral and intellectual commitment to the principle of justice which directs that like cases should be treated alike,¹⁴² that we can recognise the powerful, normative, rule justifying role that this element of the good life can play within our criminal justice system and fully appreciate the links that we can make between the element of respect and these aspects of a crime.

Once we adopt the view that all human beings are by nature equals, the direction to treat like cases alike requires more from us than a mere attitude of respect. In fact, the principle of justice is directed not to our attitudes at all, but to our conduct itself: given that we are equals, it requires each person, whatever they might think of others, to treat them as equals. The making of this connection transforms our reciprocal desire for respect into a reciprocal rule of respect – a rule that applies to the conduct of all those within the community of equals. This rule prescribes that each person within that community should acknowledge *in their conduct* that each human being is entitled to be treated as a person of equal dignity, worth and value. Our mutual desires to be respected and to count for something in the eyes of others within our community and our shared belief in the principles of human equality, justice, and treating like

¹⁴¹ Many of the commentators referred to in footnote 119 consider that the aspect of respect for the dignity, worth or value of others is important: Kahan and Nussbaum 'Two Conceptions of Emotion' at 351-352; Jeffrie Murphy, *Mercy and Forgiveness*, at 14-15; Jean Hampton, *Mercy and Forgiveness*, at 43-53 and 135, 'Correcting Harms' at 1677 and 1683; Simester & von Hirsch 'Rethinking the Offense Principle' at 291. See also my notes on Aristotle, Bentham, Mill, Kant, Hegel, Dubber, Lacey, Wright and Owen in footnote 146 below.

¹⁴² Richard Posner argues that this principle is not a moral proposition, but is purely a logical statement, however, given that the formulation includes the normative prescription that we 'should' in our conduct treat like cases alike, it therefore sets up a standard of behaviour which is used to direct and judge human conduct, not simply on logical but also on moral grounds. Posner RA, *The Problems of Jurisprudence*, (Harvard University Press, 1990) at 332-333. The fact that the principle does not direct us towards substantive content does not preclude it from being a moral proposition. See also Dworkin R, *Law's Empire*, (Fontana Press, London, 1986) at 165-167.

cases alike, therefore give rise to a mutual entitlement to be treated as an equal by others and a reciprocal duty to respect that entitlement in others.

TABLE 9.2
TRANSFORMING A DESIRE FOR RESPECT INTO A NORM OF CONDUCT
1. We share the desire to be respected by others within our community.
2. We share the belief that all human beings are, by nature, equal.
3. We share a commitment to the principle of justice which directs that like cases should be treated alike – and equal cases equally.
Conclusion: It is right therefore, that each person within the community should not only respect the equal value of others, but in their conduct should treat them as equals.
Significance: Our shared identity as human beings and as members of a community, when combined with our reciprocal desires and our shared beliefs, prescribe and justify a norm of conduct, not merely an attitudinal norm.

It is the shared commitment to the principle of justice or treating like cases alike which gives normative power to this element of the good life, and which differentiates it from the other two elements of welfare and autonomy by extending it from a mere desire into a morally legitimate basis for prescribing norms of conduct. This commitment to the notions of equality and justice limits the scope within which we can pursue our desires and, more importantly, it allows us to draw the kinds of clear lines that we need in the context of the criminal law when a community must settle upon a single standard to govern the conduct of its members.

The rule of equal respect is similar in some ways to the golden rule which requires a person to ‘Do unto others as you would have them do unto you.’¹⁴³ However, the rule requiring conduct that respects the equal value of others is a far more useful principle because the notion of equality contained within it provides us with a guide to setting minimum standards of conduct towards others, which the golden rule, because it is unbounded as to upper and lower limits and is directed towards individuals only as individuals, cannot supply. The golden rule imposes a unilateral,

¹⁴³ See Wattles J, *The Golden Rule*, (Oxford University Press, 1996); Matthew 7:12 and Luke 6:31. See also Mill JS, *On Liberty and Other Essays*, above footnote 119 at 148. There is a negative version of the rule (an example of which can be found in the French Declaration of the Rights of Man and the Citizen) which says ‘Do not do to others what you would not want them to do to you.’

self-focused duty upon individuals.¹⁴⁴ It prescribes that each person's conduct towards others should be set by reference to the individual's own particular, idiosyncratic standards. This approach is designed to provide an individual with a morally acceptable personal code to live by, but it cannot yield the kind of universal standard which the criminal law requires because it allows each member of a community to adopt a different standard for their own conduct depending on their own unique position and their own particular desires. By contrast, a focus on our reciprocal duty to respect the equal worth of others can provide us with a single, clear, minimum standard that will apply uniformly throughout a community: if all human beings are of equal worth and if all members of a community have recognised a mutual entitlement to be treated as equals that flows from that status, then, within the bounds provided for by the state, no individual is entitled to impose their will upon others or to pursue their desires for welfare or autonomy at the expense of others without justification.¹⁴⁵

The basic premise underlying this principle increases the chances that all members of the community will be able to agree on the wider system of rules that it justifies. The fact that these common themes of reciprocal respect, human equality and human dignity run through so many works of legal, political and moral philosophy is testament to their ability to form the basis of widespread agreement.¹⁴⁶ Because these

¹⁴⁴ Despite the fact that the rule lays down a process for determining what is to count as ethical conduct towards others, I say that it is self-focused and unilateral because the source of the standard is to be found within the individual's own desires, and it is only when the standards of two or more individuals match that reciprocal treatment between persons will follow.

¹⁴⁵ As I discuss below, this everyday norm requiring us to respect others as equals is limited in the criminal law to the cases where the community has chosen to recognise and protect certain interests in welfare and autonomy, and this means that within those bounds, whenever one person's desire conflicts with another person's protected interest, persuasion and not force or coercion must be used to resolve the issue.

¹⁴⁶ Many of these themes run through the wide variety of works listed above in footnote 119 including those whose views are commonly seen as being in opposition, for example, Bentham and Mill on the one hand and Kant and Hegel on the other. However, Bentham and Mill, like Kant and Hegel, both championed the notion of equality and argued that the happiness or value of any one individual should count equally with that of any other: see Mill's discussion of Bentham's famous aphorism 'Each is to count for one and no-one more than one' in *On Liberty*, at 198-199. Kant argued in *The Metaphysics of Morals*, at 434-435, that our intrinsic value as human beings lies in the dignity (or absolute inner worth) by which we exact respect for ourselves from all other rational beings in the world and suggested that this, combined with our capacity for rational thought and

rules of conduct are based on our shared beliefs, our shared nature as human beings, and our common status as members of a particular community, they can command the allegiance of each member of the community. The fact that these aspects are the most fundamental categories of similarity that exist between human beings creates a common normative ground that not only justifies the community's rules, but allows those rules to reflect both the essential nature of each person (as a thinking, feeling, reasoning, embodied and social human being) as well as the nature of the group itself and all the things (like equality, democracy, liberty and justice) that the group stands for. Furthermore, once the state itself is seen as a legal person that represents the community and the things it stands for, the principle will also function to provide a limit on the acts of the state itself. As Ronald Dworkin has pointed out, a principle of this nature unites a number of legal and ethical doctrines and requires a government to 'treat its citizens with the respect and dignity that adult members of the community claim from each other.'¹⁴⁷ I will explore the usefulness of this insight further in Chapters Eleven and Twelve, where I will suggest that it can in certain circumstances justify placing limits on the extent to which the state may legislate against certain kinds of conduct and punish offenders for the harm that they have caused.

Equality is an abstract concept, which, when applied to human beings, makes sense only in circumstances of factual difference. As many have pointed out, the principle

autonomous action means that each one of us can therefore measure ourselves and our value with every other rational being on a footing of equality. Hegel called on everyone 'to respect others as persons' and considered that all are 'equal insofar – and only insofar – as they bear within themselves the potential to gain self-recognition.' See Dubber MD, 'Rediscovering Hegel's Theory of Crime and Punishment' (1994) 92 *Michigan Law Review* 1601 at 1617. Nicola Lacey, in *State Punishment*, above footnote 73 at 144-148, traces the liberal themes of equality and 'taking persons seriously as moral agents worthy of equal respect and concern' from Kant, Bentham and Mill, to Hart, Dworkin, Rawls and Singer. See also Owen D, 'Philosophical Foundations of Fault in Tort Law' above footnote 119 at 203-211. Richard Wright explains in 'Right, Justice and Tort Law' above footnote 119 at 166, that both Kant and Aristotle ground their theories on the equal absolute worth of each individual as a free rational being (however, as I pointed out in footnote 9 of Chapter Eight above, Aristotle's vision of an ideal democracy where each lives in a community of free and equal individuals was limited only to free, adult, male citizens). A good longitudinal summary of the historical development of these concepts can also be found in JM Kelly's *Short History of Western Legal Thought*. Constraints of space prevent me from explaining in detail all of the similarities and differences between my approach and those of all of these philosophers.

¹⁴⁷ Dworkin R, *Taking Rights Seriously*, (Duckworth, London, 1977) at 11, 272-278.

that like cases should be treated alike has a corollary which requires us to take account of any relevant differences between individuals¹⁴⁸ and the task of defining the relevant grounds for treating some people the same and others differently is one which challenges the criminal justice system at all of its stages. The principle requiring us to treat others as persons of equal value therefore suggests that our rules of conduct must make room for exceptions, and as we shall see below, we appear to apply a higher standard of duty requiring greater consideration for others in cases where factual inequalities of power and capacity exist between parties to any transaction (for example, when adults deal with children, or when the state deals with citizens), and we make a range of exceptions for cases of accidents, and for those whose capacity to recognise the equal value of others or whose power to control their actions falls below the norm. So, bearing in mind the need for exceptions, I propose that the two aspects of the good life element of respect should be used to inform our understanding of the two concepts of wrongdoing and fault in the criminal law and suggest that we can interpret the aspect of fault as the personal failure to recognise or respond properly to the equal value of others, and view criminal wrongdoing as conduct that does not respect our reciprocal entitlement to be treated as equals.

The foregoing discussion has shown that by basing our rules on the legitimate expectation that each adult person¹⁴⁹ will respect others as persons of equal abstract moral worth and will treat them accordingly, we not only give ourselves a reason to tame our individual desires, but at the same time we provide ourselves with a useful practical guide to conduct that every person can not only agree with, but can safely and easily follow in most circumstances. The everyday norm requiring each person to respect the entitlement of others to be treated as a person of equal value prescribes that whenever the desires of two or more persons conflict, any use of fraud, force or

¹⁴⁸ See Hart HLA, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) at 173-4; *The Concept of Law*, 2nd ed, (Clarendon Press, Oxford, 1994) at 155-167. Similar points have been made as far back as Aristotle, *The Nichomachean Ethics*, (Oxford University Press, 1998) at 112; see also von Leyden W, *Aristotle on Equality and Justice*, (MacMillan, London, 1985) at 5. Other recent accounts include: Gardner J, 'Crime: In Proportion and in Perspective' in Ashworth A & Wasik M (eds), *Fundamentals of Sentencing Theory*, (Clarendon Press, Oxford, 1998) 31 at 36; Murphy, 'Mercy and Legal Justice' above footnote 119 at 171.

¹⁴⁹ As we shall see below in sections 10.2 and 10.3 of Chapter Ten, different rules apply to those who do not have the capacity to recognise or respond to the equal value of others.

coercion is ruled out and the only acceptable way to resolve the issue is to resort to persuasion or to let the status quo prevail.¹⁵⁰ Of course, the actual boundaries that any community might want to set for the conduct of its members and the factual content of the specific legal entitlements which we might choose to give ourselves are not themselves suggested by this factually 'empty' rule of conduct.¹⁵¹ This is because the element of the good life that requires equal respect is focused on the abstract meaning that we read into a person's conduct and the particular attitude towards the value of others that lies behind it, rather than its content. If we want to fill our criminal law with factual as well as normative content, we must look to the other desires and needs that we share in equal measure and consider the other two aspects of the good life that we all seek to pursue, namely, our welfare and our autonomy.

I suggest, therefore, that the normative boundaries of the criminal law should be drawn by reference to a principle of 'respect for others'¹⁵² and that its factual boundaries should be settled by the 'harm to others' principle. Supplementing the harm principle with the respect principle would complete our picture of a crime as conduct which is seen by the community as threatening the twin normative and factual foundations of the good life for human beings which the state exists to provide for and to protect. Furthermore, if we can establish that our wider criminal justice practices have valued the normative principle more highly than the factual principle, this will allow us to construct a model of the sentencing decision that justifiably uses the respect-based aspects of fault and wrongdoing to construct a rule of remoteness that limits the extent to which we can punish offenders for the harm that their offences cause, and which, by connecting the positive good life values with the negative aspects of any crime, will enable us to arrive at an evaluation of the quantum of punishment that we can justifiably impose upon offenders. My conclusions about the connections that we can make between crime and the good life and the significance of those connections for the criminal law are summarised in Table 9.3 below.

¹⁵⁰ This straightforward basis for the rule explains why ignorance of the law is generally no defence to a criminal charge. The basic rule requiring us to treat others as equals is enough in most cases to guide our conduct and keep us from breaking the law. I discuss this issue in section 11.3

¹⁵¹ Hart describes the formal principle of justice as 'empty' in *The Concept of Law* at 155-167 and as 'hazy' in *Punishment and Responsibility* at 173-4: see references in footnote 148, above.

¹⁵² To match John Stuart Mill's negative 'harm principle' the 'respect for others' principle could perhaps be recast in the negative as the 'disrespect principle'.

TABLE 9.3 MAKING CONNECTIONS: CRIME AND THE GOOD LIFE			
THE ASPECTS OF A CRIME	HARM The adverse effect of the conduct that has made a person or a community worse off: <ul style="list-style-type: none">• actual states,• expectations, or• relative position.	WRONGDOING The social meaning of the conduct as a deviation from a rule, norm or standard of conduct that is thought to be right.	FAULT A person is at fault if their responses to their circumstances are not as they should be, ie, if they deviate from those that are thought to be right.
THE ELEMENTS OF A GOOD LIFE	WELFARE Passive states of wellbeing. AUTONOMY Active states of wellbeing, or well-doing.	RESPECT (1) Being treated as an equal by others. RESPECTFUL CONDUCT Respectful conduct treats others as persons of equal dignity, worth and value.	RESPECT (2) Being recognised as an equal by others. RESPECT Respect is an attitude which recognises that all human beings are equals.
MAKING THE CONNECTION Relating crime to the good life	HARM Setbacks to or adverse effects on our welfare or our autonomy that make us worse off. Our understanding of harm in the criminal law is informed by: our perception that a person's conduct has made us worse off, either in terms of <ul style="list-style-type: none">• our welfare, or• our capacity and/or our opportunities to control our own lives.	WRONGDOING Conduct that deviates from the norm requiring each person to respect others by treating them as persons of equal dignity, worth and value. Our understanding of criminal wrongdoing is informed by: our interpretation of the abstract social meaning of certain conduct as a failure to respect our reciprocal entitlements to be treated as persons of equal value.	FAULT The personal failure, in the circumstances, to recognise or to respond properly to the equal value of others. Our understanding of the concept of fault is informed by: our interpretation of the personal responses of the offender and their attitude towards the value of others, read in the light of their particular circumstances.
FUNCTION IN THE CRIMINAL LAW	'Harm to Others' The 'harm principle' sets the factual boundaries of the criminal law.	'Respect for Others' The 'respect principle' sets the normative or moral boundaries of the criminal law at each stage of legislation, verdict and sentence.	

9.6 Conclusion to Part III: supplementing the harm principle

The analysis in Part III has uncovered some of the difficulties that are commonly encountered by those who have tried to find one key purpose or single value that explains our punishment practices. The search for a single aim or principle that can control our decisions in the criminal justice system founders upon the very nature of the concepts that we have seized upon to explain and justify the contours of the criminal law: harm as a concept cannot form the basis for agreement because it offers too much; and the notions of wrongdoing and fault do not offer enough. For completely different reasons, not one of these concepts on its own can do the job we require of it and the discussion in this chapter has confirmed the conclusions drawn in Part II, and gone some way towards explaining why we have been unable to reach any theoretical agreement on these problems¹⁵³ and why we might have to expand our vision to include both the factual and the normative aspects in order to resolve them.

We discovered that human beings living in modern western democracies want many different things from life. As a result we consider it possible to be made worse off or harmed in a multitude of different respects and by many different kinds of events. Sections 9.2 and 9.3 created a huge catalogue of harms, each of which may be of relevance when we come to set the boundaries of the criminal law and when we sentence offenders for their crimes. My analysis revealed that both our welfare and our autonomy are made up of a large number of different strands and that there are times when our desires for these good things compete. Furthermore, despite the fact that we all give some value to these separate dimensions of our wellbeing, each one of us within the community may well value each one of those strands differently. For these reasons, our vulnerability to suffering harm through the conduct of others, while clearly of vital importance to the criminal law, cannot offer us any single, obvious or uncontested solution to the problem of legislating its boundaries. The concept of harm is packed with factual content; it is so multi-dimensional, so varied, so differently interpreted and valued by each person, and so compendious and extensive in scope that it is unsuited to the rule making function. If we settle upon harm as our source of limits it will take us too far in our search for the boundaries of the criminal law.

¹⁵³ So, for example, my analysis has explained why commentators like Nicola Lacey and Andrew Ashworth have been unable to find any consistent pattern in our community's choices between welfare and autonomy. See references in footnotes 83 and 84 above.

When we turn to the normative concepts, however, we are confronted by a completely different problem. Whereas harm has too much content, wrongdoing and fault do not have enough, and in fact it is the very emptiness of these concepts that has made them such a source of difficulty and disagreement in our debates. The concept of wrongdoing – and the concepts of fault, justice, and the principle of treating like cases alike with which it is associated – are all, in their ordinary sense, empty forms that each person can fill with different normative content depending on their own personal convictions and beliefs. In the search for the difference between right and wrong, some seek guidance from religious teachings, some from philosophical theories, and some find assistance in the golden rule which has featured in the moral teaching of so many different cultures. However, while each of us as individuals may be able to find a satisfying answer to this question for ourselves, the search to find a single account that will solve this problem for the community has proved to be more challenging, and as a result, we have tended to resolve the issues raised by the criminal law on a case by case basis rather than by reference to any particular theoretical account. Joel Feinberg has tried to find a solution by offering a normative interpretation of harm which melds the concepts of fault and wrongdoing into an extended definition of harm, but I have suggested that we need to keep each of these three concepts separate if we are to have any hope of properly structuring our sentencing decisions and evaluating fairly the seriousness of a crime in a way that is consistent with the values lying behind the choices that we have made at the earlier stages of the criminal justice process. Consequently, I have tried in this thesis to find a different solution to the problem posed by each of these distinct aspects of a crime.

This chapter offers part of that solution. It began with an idea and an observation: the idea was to find out whether it is possible to make links between the things that we as a community think are good and the things that we think are bad; the observation was that words like good and bad have two senses that encompass both factual and normative connotations. As a result of my application of the definitions of the three aspects of a crime to the three elements of our community's conception of the good life, I concluded that our double faceted vision of the good life is indeed mirrored – and reversed – in the factual and normative aspects of a crime and I suggested that we can link the factual aspects of a crime with the factual elements of the good life and the normative aspects of a crime to the normative aspect of the good life. The links that I have made between the positive and the negative aspects of crime

and the good life suggest that the following two propositions may go some way towards explaining the reasons for our community's beliefs about the kind of conduct that we think is good for us and good to do – as well as the kind of conduct that we think is bad for us and bad to do – in our current social and cultural circumstances.¹⁵⁴

• **Our factual assessments may be based on the 'harm principle'**

It is (factually) good for human beings to be able to enjoy their welfare and to exercise their autonomy, and it is (factually) bad for human beings if either their welfare or their capacity (or factual opportunities) to exercise their autonomy suffer a setback.

Any conduct or event that makes us worse off either in terms of our welfare or our autonomy is harmful (but it is not necessarily wrongful).

• **Our normative assessments may be based on the 'respect principle'**

It is (morally) good for human beings to respect the equal value of others and it is (morally) bad to act in such a way that does not respect the equal value of others.

A person who does not recognise and respond properly to the equal value of others is at fault, and any conduct that fails to respect the entitlement of others to be treated as persons of equal dignity, worth and value is wrong.

I have suggested that we can use these links between our conception of a crime and the valued elements of the good life to expand our community's understanding of the nature of a crime by including in our description an explicit recognition of both the factual and the normative dimensions that each of these mirror opposites contains. I submit that in our current community we may be able to describe a crime as conduct that is read as a failure to respect the equal value of others (the normative limb) and their equal entitlement to pursue and enjoy their welfare and exercise their autonomy within the boundaries provided for by the state (the factual limb). This hypothesis will be tested in the first two chapters of Part IV, where I will look at our actual criminal justice practices and consider the decisions that have been made at each of the stages of legislation, verdict and sentence in order to see first, whether this two dimensional vision of a crime can provide us with an adequate descriptive account of the criminal law as it currently exists, and secondly, whether it is possible to discern any pattern in those decisions that will indicate whether we have allocated a higher priority of value to one of these dimensions over the other.

¹⁵⁴ Dworkin R, *Law's Empire*, (Fontana Press, London, 1986) at 216 makes a similar claim: he does not suggest that his interpretation of the law yields 'an abstract and timeless political morality'.

PART IV

SETTING THE MORAL LIMITS: HARM, CRIME AND SENTENCING UNDER THE GOOD LIFE MODEL

Chapter 10 The Two Dimensional ‘Good Life’ Model of the Criminal Law

- 10.1 Introduction to Part IV
- 10.2 The two dimensions of the good life model
- 10.3 The factual dimension of harm
- 10.4 The normative dimension of respect
- 10.5 The significance of harm and its dual role in the criminal law

Chapter 11 Evaluating Harm’s Role: Legislation, Conviction and Sentencing

- 11.1 Introduction
- 11.2 Evaluating the limits on the legislative decision to criminalise
 - (a) Attempts
 - (b) Acts and omissions
 - (c) Contested cases
- 11.3 Evaluating the defences and the limits on our decision to convict
- 11.4 Evaluating the sentencing decision to punish
- 11.5 Conclusion

Chapter 12 Conclusion: Punishment and the Problem of Harm

- 12.1 The nature of harm
- 12.2 Harm’s role in the criminal law
- 12.3 Harm’s role in sentencing law
- 12.4 Conclusion: criminal justice and the problem of punishment

Chapter 10

The Two Dimensional ‘Good Life’ Model

of the Criminal Law

10.1 Introduction to Part IV

Chapter Nine concluded with the suggestion that the open concept of a crime can be given more detailed content by relating the three aspects of a crime to the three elements of a good life that we value most. I argued that a crime can be seen as conduct that threatens the twin foundations of the good life for human beings living together in a community and suggested that, just like the good life which it mirrors, a crime contains the same two dimensions; the normative and the factual. Both of these dimensions can be broken down into two distinct sub-parts, each of which contains a separate test that can guide the decisions made within our criminal justice processes.

TABLE 10.1 THE TWO DIMENSIONS OF A CRIME			
THE NORMATIVE DIMENSION 'Respect for the Equal Value of Others'		THE FACTUAL DIMENSION 'Harm to Others'	
WRONGDOING Conduct towards others Conduct that deviates from the norm requiring each person to respect others by treating them as persons of equal dignity, worth and value.	FAULT Responses to others An attitude which fails, in the circumstances, to recognise or to respond properly to the equal value of others.	HARM TO WELFARE Setbacks to welfare (ie, our passive states of wellbeing) that make us worse off.	HARM TO AUTONOMY Setbacks to autonomy (ie, our active states of wellbeing – or well-doing) that make us worse off.

The normative dimension is informed by the value that we place on being respected by others and it comprises two aspects: the aspect of wrongdoing focuses on the general social meaning of a person’s conduct, interpreted as a deviation from the norm requiring each person to respect others by treating them as equals; and the aspect of fault refers to a person’s attitudes and their specific personal failure, in the

circumstances, to recognise or to respond properly to the equal value of others. The factual dimension is directly related to our understanding of harm and it is informed by the value that we place on our welfare and our autonomy.

Like many others, I have argued that the decisions we make within the criminal justice system should be consistently ordered around a coherent scheme of values. In the absence of any agreement on a philosophical account of punishment or a moral theory of ethics that can order our values and direct our decisions for us, I have suggested that our decisions to legislate, to convict and to punish should therefore be based on a single set of principles and values that can be applied consistently throughout the criminal justice decision making process. In this chapter of the thesis, I will expand upon the content and application of this two dimensional value based model of a crime and in the final chapter I will use it as a basis for an expanded model of the sentencing decision that explains how we should respond to the harm done or risked by an offender. However, before it is possible to use the model in this way it is first necessary not only to confirm that it offers a plausible descriptive account of our current criminal justice practices but also to demonstrate that it can offer an explanation of these practices that is convincing enough to justify modelling our sentencing decisions around it.

Ronald Dworkin has suggested that a successful interpretation of the law must not only fit with, but must also justify, the practice it interprets,¹ but some commentators, like Alan Norrie and Mirko Bagaric, for example, have argued that our criminal justice practices and our sentencing systems are neither rational, nor principled, but are, rather, caught between irreconcilable poles, hopelessly contradictory, fundamentally ambiguous, and incapable of delivering either individual or social justice.² If these critics are right, our criminal justice practices could not yield any

¹ *Law's Empire*, (Fontana Press, London, 1986) at 285. Dworkin argues that an account of the law must satisfy the test of descriptive 'fit' and must also provide justificatory 'fit' (which he variously explains as providing 'an attractive picture of law's point' or 'honoring' 'explaining' 'justifying' or 'showing [our practices] in a better light') in *Law's Empire* at 150, 215-216, 255, 285.

² See Norrie A, *Crime, Reason and History*, (Weidenfeld and Nicolson, London, 1993); 'Simulacra of Morality? Beyond the Ideal/Actual Antinomies of Criminal Justice' in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 101; *Punishment, Responsibility and Justice: A Relational Critique*, (Oxford University Press, 2000). For critique, see Duff RA, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of*

coherent interpretation upon which to base a principled model, but I believe that while it may not be possible to reconcile every decision made within our criminal justice system, it is nevertheless possible to make sense of its basic structures.³ Consequently, in the first two chapters of Part IV, I propose to use the two dimensional model of a crime as an analytical tool to search for that structure and to identify whether there is a coherent pattern of values which supports that structure and can explain the reasons behind our decisions to criminalise, to convict, and to punish.

My two dimensional model of a crime was derived from two sources: the first was my analysis of the meaning of the three concepts of harm, wrongdoing and fault, which form the basis of our shared understanding of the concept of a crime; and the second was our vision of a good life for humans as physical, rational, emotional and social beings, who in modern times must live together under the government of the state. The 'good life' model offers us the best possible chance to come to agreement because it is based, not on divisive theories of ethics, but on the things that unite us: our shared language; our shared values; our shared nature as human beings; and a recognition of our shared circumstances and our common need to share our lives together in a community. Because this model makes direct links between the elements of a good life that we value most and the key aspects of a crime, it offers us in the one package, a comprehensive yet flexible tool, which can be used not only to analyse the structure of our criminal laws but also to reveal the priority that we have given to the values that have informed our decisions about that structure which have been made at each of the legislative, trial and sentencing stages of the criminal process.⁴

With the exception of those who follow a utilitarian path, there has been a traditional tendency among theorists to use different sources of critique, different philosophical theories, different clusters of concepts and principles, and different analytical tools to structure our debates as we shift our focus from one part of the criminal justice process to another. So, for example, when we discuss the legislative problem of setting the moral limits of the criminal law we might follow Feinberg and

Legal Studies 189; 'Principle and Contradiction in the Criminal Law' in Duff RA (ed), *Philosophy and the Criminal Law*, (Cambridge University Press, 1998) 156. See also Bagaric M, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597; *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001) who describes our current sentencing system as irrational.

³ See the references to Duff in footnote 2 above.

⁴ See text and references in Chapter Eight at footnote 10: our choices reveal our values.

structure our discussion around the effects of a person's conduct and use the aspects of 'harm to others', 'offence to others', 'harm to self', 'harmless wrongdoing' and 'free-floating non grievance evils'; or we could adopt Ashworth's approach which identifies a range of principles (like the principle of welfare, the principle of individual autonomy, the harm principle and the *de minimis* principle, etc) that 'may tell for or against making conduct criminal' without making any attempt to arrange them into a hierarchy or to search for any 'objective benchmark of criminality'.⁵

On the other hand, we have a different set of principles, rights and values to consider when we discuss the proper controls over our criminal justice procedures⁶ and our rules of evidence and yet another range of tools to use when we discuss the substantive criminal law. For example, we might structure our debates around the traditional analytical categories of *actus reus* and *mens rea* (or the more modern interpretation which looks at fault elements and conduct elements); we might contrast the general part with the special part, the offences with the defences, completed offences with inchoate offences; and adopt any one of a range of 'bipartite, tripartite or quadripartite modes of analysis.'⁷ Finally, when we consider the right way to structure our sentencing decisions, we could first conduct our analysis of the relative importance of the roles of harm and culpability by reference to the theories of deterrence, incapacitation, retribution (or desert theory), rehabilitation, etc; and then, when we turn to determine the quantum of a sentence we might use von Hirsch and Jareborg's model (which is based on a living standard analysis that focuses on the four generic interest categories of physical integrity, material support and amenity, freedom from humiliation and degrading treatment, and privacy and autonomy)⁸ to analyse the interpersonal victimising crimes, and develop a different approach to guide our responses to those that remain.

⁵ Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 24. Nicola Lacey uses a similar approach, but includes a somewhat different selection of principles: see *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 98-120.

⁶ See Ashworth A, *The Criminal Process: An Evaluative Study*, 2nd ed, (Oxford University Press, 1998), Chapter Two: 'Towards a Framework of Evaluation' at 25-66.

⁷ Fletcher GP, 'Criminal Theory in the Twentieth Century' (2001) 2 *Theoretical Inquiries in Law* 265.

⁸ von Hirsch A & Jareborg N, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

While I do not deny the usefulness of many of these traditional methods of debate and analysis,⁹ my primary aim in using the two dimensional value-based model in Part IV is to find out whether our criminal justice practices currently give priority to responding to the normative respect based values or to the factual harm based values. If it can be established that the normative aspects of wrongdoing and fault are viewed as being more important than the factual aspects of harm, namely, our welfare and our autonomy, then we can add this finding to the argument developed in Part II which was based on the *priority of meaning* given to these concepts, and justify, on two separate grounds, adopting an approach that organises our sentencing rules around the same set of concepts arrayed in the same *priority of value*. Consequently, it is essential to use one single model at each stage of the analysis, and that model must necessarily be based on a consistent set of values taken from a single perspective. These values must also be organised into a single schematic form and linked to a single set of structural concepts, so that it will be possible to conduct the necessarily brief,¹⁰ but systematic examination of our criminal justice practices that can deliver a clear answer to this question. Whether this evaluative model can yield a single, unified and coherent picture of the wider process and the decisions made within it remains to be seen.

Certainly, the analysis of the multi-stranded elements of welfare and autonomy in Chapter Nine suggests that our pattern of choices is not consistent when we have to evaluate the relative importance of these two incommensurable elements of the good life, and it is significant that both are located within the same factual harm-based dimension.¹¹ However, I do not intend to see whether we have arranged these two

⁹ While I deny the usefulness of the concepts of deterrence, retribution, rehabilitation, etc within the traditional 'purposes of punishment' debate, I do acknowledge that these matters are worthy of consideration and debate provided they are viewed as important sub-issues or by-products of our criminal justice practices and not their general justifying aim: see my Introduction to this thesis and section 11.4 of Chapter Eleven.

¹⁰ The range of decisions that we have made within our current criminal justice system is huge, and constraints of space prevent me from pursuing the wider applications of (or indeed, the limitations of) this model, which will have to be tested more fully at another time.

¹¹ See Lacey, *State Punishment*, above footnote 5 at 116-117, 187-189, 198-201. Lacey (at 199) resists a 'rigid prioritisation' of the values of welfare and autonomy and (at 188) argues that these issues must be negotiated sensitively and with a 'conscientious effort' to 'balance the pursuit of, and to recognise the discrete value of the goods in question'. I agree that we do not appear to have

elements, or indeed, the three elements of the good life into a hierarchy of value. The task of determining the relative priority between the normative and the factual dimensions of a crime that will be carried out in Part IV is not so ambitious, and, given that the notion of a crime itself has a strong normative connotation, it may not be so difficult to distinguish a pattern of choices made between the factual and multi-focused harm based dimension of a crime on the one hand and the normative, single-focused, respect based dimension on the other. In fact, I suspect that the choice that the criminal law requires us to make between protecting the normative as opposed to the factual dimension of the good life is one that is more easily made and more easily detected than the much wider and more confusing range of choices that we as a community have to make when we decide how to respond to conduct that may threaten the many different strands of the harm based dimension of the good life.¹²

Part IV is divided into three chapters. The first chapter presents an expanded version of the two dimensional good life model and a more detailed examination of the special conceptions of the notions of wrongdoing and fault contained in our criminal law. It begins by showing how we can use the two factual and normative dimensions to reclassify the full range of crimes (including those generally organised under the headings *mala in se* and *mala prohibita*) and it seeks to explain how the concept of equality in both its factual and moral senses can provide principled guidance for the legislative decisions giving particular substance to the criminal law. This chapter identifies the special unifying role played by the principle requiring each person in a community to treat others as persons of equal value and ends by explaining the double significance of harm's role in the criminal law.

given a particular 'lexicographical priority' to the two aspects of harm (welfare and autonomy) but, as I demonstrate below, it does appear that our criminal justice system has given a greater value to the normative aspect of respect as opposed to these two other (harm-based) factual aspects.

¹² We sometimes try to protect a person's welfare at the cost of their autonomy (eg, by insisting that they wear seatbelts or helmets while driving on a public road in cars or motorbikes, or when we punish consensual sado-masochistic practices or consented-to maimings) while at other times we protect autonomy at the expense of a person's welfare (eg, when we criminalise paternalistic medical interferences with the body of another which would actually improve the welfare of the victim). This issue is complicated by the competing interests of different individuals in any society and so, for example, we are willing to impose on a person's autonomy and quarantine them if they are suffering from a deadly infectious disease like SARS that may spread to others and affect their welfare. These examples confirm Lacey's conclusions, noted in footnote 11 above.

Chapter Eleven tests the descriptive validity and practical application of the good life model, using the two legislative principles of ‘harm to others’ and ‘respect for others’ and the account of the three concepts of wrongdoing, harm and fault given in Chapter Ten as the foundation of the analysis. It considers four legislative questions:

- the problem of attempts;
- the act/omission distinction;
- a broad range of contested cases (like drug use, adultery, loitering, prostitution, homosexual intercourse, pornography, flag burning, etc); and
- the tort / crime distinction.

I argue in this chapter that the two dimensional good life model can account for many of our existing legislative and judicial decisions and can also explain and resolve our misgivings about its content. I conclude that, with one exception (in the case of misconduct with human corpses, where I would allow the respect principle on its own to justify imposing the criminal sanction), we should not declare conduct to be criminal unless we can first satisfy both the ‘respect for others’ principle and the ‘harm to others’ principle. Section 11.3 considers the decisions made at the trial stage of the criminal process and focuses on the choices that we have made when allowing defences to a criminal charge. Section 11.4 completes the chapter by analysing some of the significant structural features of our punitive responses to those who have been convicted of crimes and contrasting them with the responses commonly used in the civil courts. In these two sections I conclude that whenever we have had to choose between allocating priority to responding to the factual dimension of any given conduct by comparison with the normative dimension, we consistently favour the normative over the factual. I conclude that the ‘respect for the equal value of others’ principle and the normative aspects of wrongdoing and fault with which it is linked is properly and consistently given a higher priority of value within our criminal justice practices and I end the chapter with the suggestion that the sentencing decision-making model which will be outlined in Chapter Twelve should reflect this fact.

10.2 The two dimensions of the good life model

Many legal scholars, in an incomplete echo of Aristotle, have suggested that the paradigm example of criminal conduct is the intentional choice to do harm to another.¹³ So, for example, Joel Feinberg argues that ‘the criminal law system is the

¹³ Aristotle, *The Nichomachean Ethics*, (Oxford University Press, 1998) at 127: ‘if a man harms another by choice, he acts unjustly’. (NB: Aristotle himself was not attempting to define a crime.)

primary instrumentality for preventing people from intentionally or recklessly harming one another'¹⁴ and John Darley (citing Paul Robinson) describes the 'paradigmatically criminal action' as 'one in which a person intentionally inflicts a harmful action, which he knows is morally wrong, on another.'¹⁵ However, when we consider the contours of our current legal system with a view to identifying the special character of the criminal law, this interpretation cannot be sustained. The 'Aristotelian' account does not fit. If we look inside the criminal law we find many offences, particularly those classified as *mala prohibita*, where the element requiring an intention to inflict harm on another person appears to be absent and other examples can be found where the intentional infliction of harm on another is either not unlawful at all or is dealt with only under the civil law system. To complicate matters, some cases are covered by both the criminal law and the law of torts.

Commonly cited counter-examples where harm can be intentionally inflicted on others without incurring criminal sanctions include the deliberate breach of a contract or the intentional act of driving a competitor out of business through fair means,¹⁶ but many others can be found, for example: terminating a worker's employment, denying shareholders a dividend, refusing to distribute funds held under a discretionary trust, misuse of trade secrets or confidential information, etc. In fact it is possible to look through many of the branches of the law and find examples from administrative law, contract law, equity, tort law, property law, the law of trusts, employment and trade union law, etc, that confound this attempt to define the boundaries and special nature of the criminal law in terms of the intentional (or reckless) infliction of harm. Furthermore, if we examine the huge range of legal actions available to plaintiffs in our civil justice system we must conclude that both our welfare and our autonomy are protected by many different causes of action, and certainly, the state's role in securing

¹⁴ Feinberg J, *Harm to Others*, (Oxford University Press, 1984) at 31; see also 107-108.

¹⁵ Darley J, 'Just Punishments: Research on Retributional Justice' in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life*, (Cambridge University Press, 2002) 314 at 319.

¹⁶ The breach of contract example is used by: Becker L, 'Criminal Attempt and the Theory of Crimes' (1974) 3 *Philosophy and Public Affairs* 262 at 263; Kleinig J, 'Criminally Harming Others' (1986) 5 *Criminal Justice Ethics* 3 at 6; and Marshall SE & Duff RA, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7 at 8. See Epstein RA, 'The Harm Principle and How It Grew' (1995) 45 *University of Toronto Law Journal* 369 at 408-416 for a discussion of other competitive and economic harms.

the conditions under which we can pursue and enjoy our passive as well as our active wellbeing is not limited to the legal sphere, but extends to include another extensive range of regulatory systems and the maintenance of welfare oriented services and facilities.

This suggests that ordering our analysis of the criminal law either around the categories of interests (whether private or public) which the criminal law protects or around the many different ways in which we can be harmed, will not lead to a satisfying explanation of our current practices. However, when we turn to the normative aspect of wrongdoing as an alternative source of guidance, we are confronted with the fact that there are many examples of conduct that is commonly thought either to be morally wrong, disrespectful of others, or highly offensive to others (like lying, cheating in games, betraying confidences, committing adultery, demeaning or belittling others, engaging in hate speech or expressions of racist, sexist or other prejudices, etc) which are either not the subject of any legal sanctions at all, or which are unlawful only under limited circumstances.

Observations similar to these have led commentators like Andrew Ashworth and Nicola Lacey to remind us that ‘the frontiers of criminal liability are not given but are historically contingent’¹⁷ and, as we saw above, they have led others like Alan Norrie and Mirko Bagaric to argue that many of our criminal justice practices are fundamentally unprincipled and incoherent.¹⁸ Certainly, these facts tend to support the view, expressed above, that neither concept on its own is enough to account for the boundaries of the criminal law as it exists today, and, if we remember the conclusion drawn by Glanville Williams in ‘The Definition of Crime’¹⁹ it might appear that any attempt to give content to the notion of a crime beyond pointing to the merely technical legal consequences of conviction (by considering such issues as moral wrongfulness or damage to the public, for example) is doomed to failure.

I suggested in Chapter Nine that a crime can be interpreted as conduct that is seen by the community as threatening the twin normative and factual foundations of the good life for human beings, and I argued in Part II and in the conclusion to Chapter

¹⁷ Ashworth, *Principles of Criminal Law*, above footnote 5 at 24-25 citing Lacey; see also 1-5.

¹⁸ See footnote 2, above.

¹⁹ Williams G, ‘The Definition of Crime’ (1955) 8 *Current Legal Problems* 107. See also Hart HM, ‘The Aims of the Criminal Law’ (1958) 23 *Law and Contemporary Problems* 401.

Nine that we need to satisfy ourselves of the existence of both the factual aspect of ‘harm to others’ and the normative aspect of ‘failing to respect others as equals’ before we can justly criminalise any given conduct as a ‘wrong to others’ and invoke state punishment as a legitimate response to those responsible for it. If we consider our current criminal laws, it does seem that neither simple harm-doing on its own nor the harbouring or expression of mere attitudes of disrespect or even hatred towards others are generally seen as supplying sufficient grounds for imposing criminal punishment. There are some limited exceptions where harm to others is not a pre-requisite (for example, the case of misconduct with human corpses, which I consider in Chapter Eleven), however, once we broaden our understanding of harm from the category of welfare and recognise that an interference with another’s autonomy should also count as a harm, there appear to be very few crimes that do not involve risking some form of harm to others, and in fact many of the classic crimes like murder, rape, robbery, etc, appear to protect both our welfare and our autonomy at the same time. On the other hand, as we have seen, there are many cases of conduct that causes harm to others that do not attract the sanctions of the criminal law, just as there are many wrongs – even highly harmful wrongs – that are not punished by the criminal law, and one of the secondary aims of this chapter is to use the two dimensional model of a crime presented in section 10.1 as a tool to search for an explanation for the existence of these defining features of our legal system. I also hope to demonstrate that those who took their inspiration from Aristotle may have cut their investigation too short and show how, if they had read further, they might have improved their accounts by incorporating his view that an act which harms another by choice is unjust – provided that the act ‘violates proportion *or equality*.’²⁰

Those, like Marshall and Duff, who disregard Glanville Williams’s warning and attempt to construct an account of the ‘kinds of wrongs that are appropriately categorised as crimes’²¹ often point to the structural differences between crime and

²⁰ See reference in footnote 13 above, at 127-128, emphasis added. Aristotle’s qualification follows immediately upon his earlier suggestion that ‘if a man harms another by choice, he acts unjustly’. Aristotle’s application of the concept of equality or proportionate equality is different from my own, but despite the fact that each society has a different understanding of the proper hierarchy between individuals within a society, Aristotle’s emphasis on equality in his account of the nature of justice remains unaffected by his now outdated views on the proper status of women and slaves.

²¹ Marshall & Duff, ‘Criminalization and Sharing Wrongs’ above footnote 16 at 7.

tort actions, and attempt to identify from those differences the special character or central feature of the conduct which we characterise as criminal. They suggest that any account of the criminal law should be able to explain why a crime puts the state in charge of the legal process whereas a tort puts the victim in charge; and why a criminal procedure leads to punishment and censure whereas a civil process leads to compensation or other forms of civil relief.²² We might also need to explain why the duties imposed upon us by the criminal law are owed to all within the community, whereas the duties imposed by the civil law are often much more limited in scope.

Marshall and Duff suggest that the answer is to be found in the nature of certain important '*Rechtsgüter*' (or legal goods), attacks upon which are seen as public wrongs because the shared values that bind all members of the community together give rise to a situation where the community sees the conduct that threatens those *Rechtsgüter* not only as a wrong done to the individual victim but as a more general attack on them, their shared values, and the common good.²³ My interpretation of a crime is somewhat similar to that of Marshall and Duff in that I have focused on the value that we as a community have placed on the different elements of the good life for human beings (what they might call the '*Rechtsgüter*'),²⁴ but, unlike them, I have focused not only on the *values* that we share but also on our conception of *the value* or the abstract moral worth that we believe all human beings share – and share in equal measure. My account of a crime, like Aristotle's account of justice, therefore places the notion of equality at the core of the model, and I want to argue that this focus on equality can explain not only why some conduct is criminalised and other conduct is made the subject only of the civil law (and why some conduct is subject to both the criminal and the civil law) but can illuminate more clearly the apparent purpose of the criminal law itself and the nature of our community's understanding of the concepts of harm, wrongdoing and fault and their special role in the criminal law.

²² See Marshall & Duff, 'Criminalisation and Sharing Wrongs' above footnote 21 at 15-17. The special 1996 number of the *Boston University Law Review* devoted to 'The Tort Crime Distinction' also contains many valuable contributions: see (1996) 76 *Boston University Law Review*.

²³ 'Criminalisation and Sharing Wrongs' above footnote 21 at 19.

²⁴ My account of the elements of the good life is not tied, as Marshall and Duff's is, to the notion of *legal goods* (the '*Rechtsgüter*') but to the good things which we desire in general as part of a good life together, and I use that broader account to explain why we see some conduct as threatening that vision of the good life that we all value, and why we criminalise some, but not all, of that conduct.

This deeper understanding is made possible not simply because the model focuses on equality, but because it links the concept of equality directly with the key principle of justice: in our conduct towards others, we must not only treat equal cases equally, but we must also treat others as equals. I suggest, therefore, that unless we have first established the factual categories of equality that exist between us, we will be unable to do the equal justice that the criminal law demands of us, because it is only when we are armed with this knowledge that we can justify *our conduct* in taking action against those persons who are seen as having failed in *their conduct* to do equal justice to others – by failing to respect their entitlement to be treated as a person of equal value and threatening their fundamental interests in welfare and autonomy which we believe all human beings share in equal measure. Furthermore, if we cannot identify the morally and factually relevant categories of equality (and inequality) that have guided the state's choices to criminalise, convict and punish offenders for their conduct, then neither will our sentencing judges be able to do equal justice to the different offenders who come before them and treat like cases alike when they assess the nature of the different crimes they have committed, their different degrees of fault, and the different kinds of harm done or risked by their criminal conduct.

The model's focus on equality and justice, when combined with its two dimensional vision of the good life for human beings, therefore points our analysis into two parallel directions: not only must we take into account, as part of the analysis of the normative dimension of respect, our vision of ourselves as persons of equal abstract moral value, but we must also consider, as part of our analysis of the factual dimension of harm, the respects in which we are factually equal to one another as well. This is because we cannot give any legal content to the 'empty' norm requiring us to respect others by treating them as equals until we have first linked it to the world of facts – and linked it in such a way that can justify the state's act, exercised under its function of protecting the conditions under which we can live a good life together, of imposing criminal punishment on those whose conduct breaches this norm. So, rather than beginning my analysis by classifying the many different ways in which we can be harmed and the different kinds of public and private interests that can be set back by the conduct of others,²⁵ I propose to go further back and take as my starting point

²⁵ In *Principles of Criminal Law*, above footnote 5 at 4, Andrew Ashworth has classified the range of criminal offences into the following five fields, each relating to the nature of the diverse public and

an analysis not simply of the ways in which we see ourselves as alike, but more importantly, of the ways in which we see ourselves as equally alike. I will then apply the model to the criminal law as it currently exists by considering both of its factual harm-based and its normative respect-based dimensions and in Chapter Eleven I will consider whether the expanded interpretation of our legislative decisions produced by this analysis can illuminate the reasons behind any of our current misgivings about the content of the criminal law or offer any answers to the traditional questions that we ask when we debate these contentious questions about its proper limits.

Despite the many differences of race, class, wealth, health, intelligence, talent and opportunity that exist between human beings there are two fundamental respects in which all of us who live in a particular state are equally alike: we are all equal as human beings, and, in modern times, we share a common identity and equal status as members of a particular community who are subject to the government of the state. These two sources of factual equality give rise to certain common interests that we also share in equal measure, and in respect of which we are equally vulnerable to suffering harm, and I want to suggest that these two sources of factual equality can supply two of the foundations upon which we can begin to classify and understand the structures of the criminal law. I suggest that we can make an initial division of all the criminal offences into two major categories, each of which requires the state to protect our diverse interests in our autonomy and in our welfare on different grounds, and each of which contains a distinctive fault element.²⁶ The first category is based on our common nature and shared identity as human beings and it protects each individual's fundamental interests in welfare and autonomy. The second category is based on our shared identity and equal status as members of the community and it protects our equally shared interests – as political and social beings – in participating in our community's political processes and in benefiting from the community facilities and services that the state provides and the community resources that the state preserves and protects. The distinctive and contrasting features of these two categories of crimes are outlined in Table 10.2.

private interests that a person's conduct may violate: offences relating to the person; offences relating to general public interests; offences relating to the environment and general conditions of life; offences relating to property interests; and finally, financial, business and industrial offences.

²⁶ There is a third (minor) classification based on our identity as animals, which I discuss below and which is summarised in Tables 10.3 and 10.4.

TABLE 10.2 CLASSIFYING THE CRIMES	
CRIMES BASED ON OUR SHARED IDENTITY AS HUMAN BEINGS	CRIMES BASED ON OUR SHARED IDENTITY AS MEMBERS OF A COMMUNITY
THE FACTUAL DIMENSION OF HARM Recognising our Equal Interests	
<ul style="list-style-type: none"> • Source of Factual Equality Our shared identity and equal status as human beings. • Common and Equal Interests arising from that Equal Status This shared identity as a human being gives every person a common and equal interest in: <ul style="list-style-type: none"> • pursuing and enjoying their welfare; and • exercising their autonomy; which the state exists to provide for and to protect. 	<ul style="list-style-type: none"> • Source of Factual Equality Our shared identity and equal status as members of a particular political community governed by the state. • Common and Equal Interests arising from that Equal Status This shared identity gives all members of the community a common and equal interest in: <ul style="list-style-type: none"> • participating in the state's political processes (autonomy); and • benefiting from community facilities, services and resources which the state provides for all (autonomy and welfare).
THE NORMATIVE DIMENSION OF RESPECT Recognising our Equal Value	
<ul style="list-style-type: none"> • Wrongdoing Conduct that is interpreted as a failure to respect the equal entitlement that each <i>human being</i> has in being treated as a person of equal value, which the state exists to provide for and to protect. • Fault A personal failure to recognise and respond properly to the equal value of <i>another person</i>, evidenced by valuing one's own desires above the fundamental interests which all human beings share in equal measure and which the state must protect. Offender's False Claim of Value "I am worth more than you are." Attitude is particular and is directed towards a specific, individual victim. 	<ul style="list-style-type: none"> • Wrongdoing Conduct that is seen as a failure to respect the equal entitlement that each <i>member of the political community</i> has in being treated as a person of equal value, which the state exists to provide for and to protect. • Fault A personal failure to recognise and respond properly to the equal value of <i>all other members of the community</i>, evidenced by valuing one's own desires above the interests which all community members share in equal measure and which the state must protect. Offender's False Claim of Value "I am worth more than anyone and everyone else." Attitude is diffuse and is directed generally towards all others in the community.

10.3 The factual dimension of harm

As we shall see in Table 10.3, which lists and classifies some of these crimes, these two categories correspond roughly with the traditional categories of crimes *mala in se* and crimes *mala prohibita*. However, because the classification is based on a different foundation, they do not correspond completely and there are some crimes, like treason or public indecency, for example, that I have moved from their traditional grouping. To recognise these different theoretical and factual foundations and to distinguish my approach to categorising the criminal law from the traditional approach, I have labelled the first category as ‘crimes of common humanity’ and the second category as ‘crimes of common community’.

The first category of crimes is based on our common nature as human beings. These crimes have as their factual focus, the protection of the two fundamental interests that all human beings have in common, namely, our basic interests in welfare and autonomy which are derived from our common nature as physically embodied, intelligent, emotional, self-directed individuals, possessed of a desire to shape our own lives for ourselves. Because we are all human beings, we all share in equal measure a vulnerability to suffering harm if these interests (in life, bodily integrity, sexual autonomy and property, etc) are set back by the conduct of others. We also share a belief that each human being has a primary moral entitlement to be treated by others as a person of equal value. Once the state, which exists to provide for the essential conditions under which we can live a good life together with others, makes the choice to recognise these fundamental factual interests which each person shares equally with others simply by virtue of their common humanity, then each person not only gains a secondary set of legally recognised entitlements but each one of us also comes under a duty, owed to all others within that same class of human beings, to respect them by treating their fundamental interests as being equal to our own.

Our legislative decisions to criminalise the kinds of conduct that threaten these interests are therefore justified not only on the grounds of our moral equality, but also on the grounds of our factual equality, and the resulting legal duty to respect those equally shared interests is (with two classes of special exceptions and one contested case, which I will account for below) owed equally by all human beings to all others, regardless of their different nationality, race or status. So, for example, the legal duty imposed under Australian laws not to murder, maim, rob or steal from others imposes

a universal and reciprocal duty on all persons in the jurisdiction to respect these fundamental interests that each and every person shares equally with all other human beings. As we shall see, this defining and distinctive feature of the crimes of common humanity can be contrasted not only with the duties imposed by the crimes of common community (which apply on a more limited basis) but also with the kinds of duties imposed on us by the civil law which (with the exception of the cases of assault, battery, etc, that are both crimes and torts) arise from and apply under even more limited and contingent circumstances. There are some special cases like the crimes of abortion, child sexual assault, incest (with minors), and having sexual intercourse with a young person or with a person of unsound mind, where the duty is not owed on a universal and reciprocal basis within the group of human beings. In these cases the duty is owed only by certain classes of human beings to other special classes of human beings. Rather than seeing the existence of these offences as invalidating my equality based interpretation of the criminal law, however, I want to suggest that each of these crimes represents an example of the special exception that the principle of justice requires us to make in cases where significant factual inequalities exist between human beings – and where we recognise the fact that these differences can lead to those special victims suffering greater harm.

In the case of abortion (which I discuss again under the issue of contested cases) the protection that is offered to the foetus is limited because, while the foetus is like all other human beings in the sense that it is *human life*, it is not seen as a fully independent individual *human person*. Furthermore, it is not until it reaches a certain stage of development that it becomes capable of existence separate from its mother. This means that while the foetus is like other human beings in one essential respect, it is not equally like us in all respects, and consequently, we have responded to the value that we place on human life by bestowing upon the foetus some limited protection, but this protection is not as great as the protection that we offer to those who, by being born alive, attain full factual equality with others and are then recognised and protected fully as legal persons. However, once we bestow this limited protection, which is often related to the stage at which the foetus becomes capable of separate existence (and thereby comes closer to full factual equality with us), the consequent duty applies on a universal basis and binds all within the limits of the jurisdiction.

Cases of sexual abuse of children or persons of unsound mind stand in contrast with the case of abortion. In the case of a foetus, its lesser status as human life (but

not as a separate, independent human person) leads to the imposition of a lower level duty of respect, whereas in the cases of sexual abuse of children or persons of unsound mind, the unequal factual status of these fully human persons results in the imposition of a higher level of duty. We can take as our starting point, our recognition of the equal vulnerability to suffering harm through setbacks to our interests in physical integrity and sexual autonomy that every human person shares,²⁷ and which is ordinarily protected by the crimes of rape and indecent assault. However, in these cases, we go beyond imposing the equal duty that protects us from this equal vulnerability and impose an extra duty which recognises the extra vulnerability of these particular human beings. So, while these victims share an equal identity with us as human persons, they are recognised as being factually unequal when they are compared with the paradigm legal person (the adult of full capacity) because of their lesser degree of cognitive capacity, maturity, understanding and power. The 'equal respect' principle therefore requires us to recognise and respond to the special factual inequality of these persons of lesser capacity in order to comply with our moral norm which requires us to respect others by treating them as persons of equal moral value.

These exceptional cases confirm the importance of the role played by the concept of equality. Factual inequality supplies the harm based foundation for this class of crimes and the normative dimension of equal respect supplies the moral foundation for imposing a higher level of duty that recognises and, in one sense, can be seen as restoring the abstract equality that exists between the factually unequal parties by demanding more from those who would deal with others who have less. These cases and the case of abortion illustrate the way that our detection of different kinds of factual equality and inequality helps us to discriminate in our legal responses to different cases and to give ever greater factual content to the empty but powerful norm of equal respect that tells us how we ought to conduct ourselves towards others.

The equality based interpretation of these crimes is strengthened when we consider the defence that is generally allowed in cases of sexual intercourse with a young person, where both parties are of roughly similar youthful age, and where no exploitation has taken place or lack of consent is manifested. In these cases the factual inequality between the parties is eliminated and the fact of consent demonstrates that the two parties have truly treated each other with respect as an equal. The existence of

²⁷ The paradigm legal person is the competent adult person (and was once the adult male citizen).

this defence suggests that the respect for others principle operates to justify the defence provided that the parties are factually of equal status (eg, where both are underage or are close in age) and provided that each has respected the other as an equal in the moral or normative sense by engaging in a mutually consensual encounter. The existence of this defence also suggests that while we may agree that it can be harmful to a young person to have sexual intercourse at an immature age, we do nevertheless give priority to the respect-based principle when we decide whether or not to punish those who engage in this potentially harmful conduct.

Recent legislative changes to incest and rape laws in many jurisdictions in Australia can also be seen as illustrating the operation of the 'equal respect' principle. In recognition of the fact that any child living in a close family relationship with an adult is vulnerable to suffering harm caused by sexual abuse, the definition of incest has been changed in many jurisdictions to forbid sexual contact between persons who stand in a parental or step relationship with a child, and no longer limits the application of this crime to those who are genetically related.²⁸ The trend to change the elements of the crime of rape by removing the requirement that the victim be a female and redefining it in non-gender specific terms also confirms that, whatever its historical origins, this crime is now being seen anew through the prism of equality.²⁹ If we accept that we should treat like cases alike and equal cases equally, then it follows that regardless of their gender, family circumstances, age or capacity, every

²⁸ The Queensland *Criminal Code 1899* incest provision, s 222(5) expands the definition of lineal descendant to include a 'half, adoptive or step relationship.' Section 44 of the Victorian *Crimes Act 1958* forbids sexual penetration of step-children or children of a defacto spouse.

²⁹ Some jurisdictions have eliminated the crime of rape altogether and have replaced it with crimes of sexual assault and aggravated sexual assault: see eg, sections 61I and 61J of the New South Wales *Crimes Act 1900*. The crime of rape in section 185 of the Tasmanian *Criminal Code 1924* was amended in 1987 and instead of forbidding a person from having 'carnal knowledge of a woman not his wife without her consent' it now forbids a person from having 'sexual intercourse with another person without that person's consent'. Sexual intercourse is, however, defined as 'the penetration to the least degree of the vagina, anus or mouth by the penis and includes the continuation of sexual intercourse after such penetration' and so the next logical step in this progression would be to remove the gender specific reference to the penis or extend the provision in the way adopted in section 349 of the Queensland *Criminal Code 1899* which defines rape to include either unconsented carnal knowledge of a person; penetration of the vulva, vagina or anus with a thing or body part; or penetration of the mouth with the penis.

person's interest in their physical integrity and sexual autonomy should be protected by the state. Because every human being shares those interests in equal measure, each of us should share an equal duty to respect those interests in others, not only in cases where we are factually equal to others, but also in cases where the special factual inequality of others means that they have a special vulnerability to suffering harm through setbacks to those same, equally shared, interests.

The process that results in the state's recognition of the second category of crimes, which is based on our equal status and shared identity as members of a particular political community, follows the same progression as those based on our common humanity and it results in a similarly distinctive legal duty. Our recognition of our factual equality as members of the community helps us to identify the factual interests that we have in common and which the state exists to protect. Our abstract moral equality provides the normative justification for protecting those equally shared interests by declaring conduct that fails to respect them to be criminal wrongdoing; and the resulting duty to respect those interests falls equally upon each person in the community and is justified on the basis of the factual and moral equality that exists between all community members. In this category of crimes, the duty is more limited in scope and, rather than being owed to all other human beings as human beings, it is owed to all others who as fellow members of the community are present in the community and subject to the government of the state. So, the duties imposed on each of us in a particular community (to avoid engaging in electoral fraud, taking scallops without a licence, or polluting the waterways, for example) protect the kinds of interests that we share equally only with others within the community (in participating in our electoral processes, in benefiting from our natural resources, and in maintaining a healthy and sustainable environment in which to live together) and which we share equally only by virtue of our common status as community members.

It is not until we have recognised both the factual and the normative aspects of our shared identity and equal status as human beings and as members of the community that we can construct any of these secondary legal norms of conduct. Once they have been recognised by the state, however, these shared legal entitlements and reciprocal legal duties create another bond of equality between us. Furthermore, when this legal recognition occurs, the full range of legal entitlements that have been derived from our single foundational moral entitlement to be respected by others and to be treated as an equal enter into our everyday discourse about rights, interests, entitlements and

duties and they become part of the framework against which we construct our own behaviour and interpret and judge the behaviour and attitudes of others.³⁰ This two dimensional equality based approach to structuring the criminal law also suggests that, for the sake of completeness, we should add a third (minor) category to our classification of our current criminal laws that is based on our common nature, not as human beings or as members of the community, but rather, on our nature as animals.

This small class of crimes creates yet another distinctive legal duty which is based on our shared identity as animals and, in recognition of each animal's common and equal factual interest in physical wellbeing and in existence as a species, places a unilateral duty on each human animal to respect these interests in other animals. The resulting duty is a limited one and, for obvious reasons, it is not a reciprocal duty. This category of crimes (like the changes to the crimes of incest and rape) illustrates the roles played by choice and cultural variation in our legislative decisions to make conduct criminal. Because we do not see other animals as being equally like us, we do not recognise them as legal persons or allow that they have autonomy interests, but, because we do recognise these two fundamental ways in which all animals are equally alike, we do see animals as 'others' who may suffer harm that is the same as the harm that we would suffer if we were to be hurt or our species driven to extinction. This equality based account explains why it is lawful to kill an animal humanely and eat it, but not to torture it or neglect its welfare. It also explains why many people in our society argue that it should be equally criminal to force animals to live in conditions tantamount to torture, merely so that we can eat them. (I will discuss the crime of bestiality when I consider the contested cases.) Table 10.3, below, completes the classification of the crimes into the three different categories based on the different sources of duty and lists some of the crimes that fall into each one.

³⁰ A failure to distinguish between the single foundational *moral* entitlement to be respected and treated as a person of equal dignity, worth and value, and the secondary *legal* entitlements that are derived from the combination of this moral norm and the kinds of factual equality shared by all human beings can lead to circularity within this discourse. This flaw in Jean Hampton's account was discussed in footnote 128 in section 9.4 of Chapter Nine. However, while Hampton's arguments do contain this technical flaw, the circularity can be easily avoided if we remember the difference between the primary moral norm of equal respect and the secondary legal norms based upon it, and the difference between our equally shared interests and the resulting legal entitlements that flow from the legal recognition of those common and equal interests.

TABLE 10.3 LISTING THE CRIMES

Crimes of Common Humanity	Crimes of Common Community	Crimes based on our Common Animal Nature
<p>SOURCE OF DUTY</p> <p>Our shared factual identity and equal moral status as <i>human beings</i> justifies imposing a duty on each person to respect the common and equal interest that other human beings have in:</p> <ul style="list-style-type: none"> • pursuing their own welfare; and • exercising their personal autonomy. 	<p>SOURCE OF DUTY</p> <p>Our shared factual identity and equal moral status as <i>members of a community</i> justifies imposing a duty on each person to respect the common and equal interest that others have in:</p> <ul style="list-style-type: none"> • political participation (autonomy); and • benefiting from community facilities, services and resources (welfare and autonomy). 	<p>SOURCE OF DUTY</p> <p>Our shared factual identity and equal moral status as <i>animals</i> justifies imposing a duty on each person to respect the common and equal interest that other animals have in:</p> <ul style="list-style-type: none"> • their physical welfare; • their existence as a species. <p>Note: this duty is not reciprocal.</p>
<p>EXAMPLES</p> <ul style="list-style-type: none"> • Murder; Manslaughter; • Genocide, crimes of ethnic cleansing; • GBH, wounding, assault; • Stalking, harassment; • Kidnapping, abduction; • Rape, sexual assault, etc; • Theft, robbery, burglary, trespass, fraud, blackmail; • Arson. <p>SPECIAL CASES</p> <ul style="list-style-type: none"> • Abortion; • Child sexual assault, sexual intercourse with a young person or person of unsound mind. <p>These special cases recognise the factual inequality of the victims.</p> <p>CONTESTED CASES*</p> <ul style="list-style-type: none"> • Abortion; • Adult incest; • Assisting suicide, mercy killings; euthanasia, etc; • Consented maimings; • Prize fighting, boxing, gladiatorial contests; • Consensual slavery; • Misconduct with corpses; • Failure to rescue. 	<p>EXAMPLES</p> <ul style="list-style-type: none"> • Treason; • Electoral fraud; • Bribing an MP; • Perjury, perverting the course of justice, etc; • Road safety, parking, licence offences; • Unsafe storage or possession of guns, etc; • Dealing in dangerous drugs without a licence; • Taxation, social welfare offences; • Insider / insolvent trading; • Taking wildlife without a licence, exceeding quotas; • Pollution offences; • Public indecency; • Public nuisance, riot, etc; • Disrupting worship. <p>CONTESTED CASES*</p> <ul style="list-style-type: none"> • Bigamy; • Possession, use of drugs; • Pornography, possession of indecent photos, etc; • Offensive speech or acts; • Homosexual intercourse; • Prostitution, pimping, etc; • Begging, loitering, etc; • Seatbelt / helmet laws; • Blasphemy. 	<p>EXAMPLES</p> <ul style="list-style-type: none"> • Cruelty to animals; • Neglect of animals; • Taking or killing animals from an endangered or protected species. <p>CONTESTED CASES*</p> <ul style="list-style-type: none"> • Bestiality. <p>* Note: The contested cases are discussed in Chapter Eleven.</p>

This discussion suggests that the two dimensional equality based interpretation offers a better way of understanding and classifying the criminal law by comparison with the 'intentional choice to do harm' account or the 'classification by interests' approach. However, to complete the analysis of the harm-based dimension, we should note that it is possible, within those two major categories, to subdivide the crimes by reference to the different interests that each crime has as its protected factual object(s). The crimes that fall into the first category based on our common humanity include the classic crimes that are directed against the person like murder, rape, wounding, assault, kidnapping, etc, as well as the more recently recognised crimes of stalking and harassment. This category also includes the property based crimes such as theft, robbery, burglary, and crimes of dishonesty and coercion like blackmail, forgery or defrauding another person of their property. However, while it is possible to subdivide the crimes within this category by reference to the kinds of interests that they protect or the distinctive ways that they may be committed, it is also important to note that many of these crimes based on our common humanity often protect both our welfare and our autonomy at the same time. Some illustrations of the different kinds of interests protected by these basic interpersonal victimising crimes and the consequent harm that may result from these offences follow:

- Murder: defeats the interest that every living person has in their existence as an individual human person and which is the foundation of all of our other interests in welfare and autonomy.
- Rape, sexual assault: initially protect a person's factual control over their own life, their sexual autonomy, and physical integrity. These crimes also offer protection against any subsequent harm to a person's physical, emotional and/or mental welfare or their ongoing capacity to form relationships of intimacy and trust.
- Sexual abuse of a child, incest with minors, sexual intercourse with a young person: these crimes offer the same protection as those offered by the crimes of rape and sexual assault, noted above. In addition these crimes offer special protection to those whose personality, and sexual and emotional development is not complete and who are therefore vulnerable to suffering permanent developmental damage as a result of such exploitation, especially if the abuse involves family members.
- Robbery: protects us from losing our autonomy over our possessions, having our personal peace of mind, security and bodily integrity threatened, and our financial welfare reduced.

The crimes in the second category have as their focus, the recognition of our nature as social and political beings, and the protection of the fundamental interests that we share with others as members of a political community. Our interests in participating in the community's political processes are protected by such crimes as treason, bribing a member of parliament or a public official, electoral fraud, etc, and those who attempt to subvert the democratic processes in these ways are seen as setting back the interests that all (adult)³¹ members of the community share in exercising their individual political autonomy. Our interests in having access to and benefiting from the community facilities and services that the state provides for all members of the community and benefiting from the natural resources that the state protects on behalf of the community, both of which may advance our opportunities for exercising our autonomy and enjoying our welfare, are protected by a large range of disparate crimes that include offences against the administration of justice like perjury, perverting the course of justice, etc; road safety, licensing and parking offences; the unsafe use, storage or dealing in guns, explosives, pharmaceutical or other dangerous goods; environmental pollution offences; insider or insolvent trading; taxation and social welfare offences; the creation of public nuisances; riot; breach of the peace; public indecency; disrupting worship; and the unlicensed taking of natural resources like scallops, abalone, etc. Although this category includes a very wide range of offences, some of which protect the multiplying interests created within developed countries by advanced industrial practices, consumer market economies, complex financial markets, and taxation and social welfare systems, others protect our more traditional interests in peaceful coexistence and fair sharing of community resources and facilities. The interests protected by some of these crimes are listed below:

- Treason, conspiring with foreign powers; electoral fraud, bribing a member of parliament, etc: these offences defeat the equal, autonomy-based, political interest that all members of the community share in determining the shape of their government. Some extreme cases of treason, aiding the enemy during wartime, etc, may also threaten the welfare-based interest that each person living in a particular state has in living in a safe, stable community.
- Insider or insolvent trading: defeats the autonomy interest that all members of the community share in participating or competing as an equal in the financial market.

³¹ See footnote 27 above.

- Parking offences: defeat the shared autonomy interest that all community members have in using parking facilities offered by the state to all (may also affect welfare).
- Road safety, licensing breaches: threaten the equal interest that all other members of the community have in using the roads safely (bodily welfare).
- Perjury, perverting the course of justice, etc: in civil cases this conduct defeats the equal interest that other members of the community have in pursuing remedies for their grievances in the courts (welfare); in criminal cases, they defeat the purpose of an institution designed to protect each member of the community's shared interest in pursuing and enjoying the good life within the community.
- Taxation, social welfare offences: threatens the financial and welfare institutions that are designed to benefit each member of the community (welfare).
- Public nuisances, riot, breach of the peace, public indecency; these offences defeat the equal interest that other members of the community have in enjoying life in a particular community and in using public roads, parks, etc, by threatening their safety or their physical integrity (welfare) or by forcing them to curtail use of public places in order to avoid being forced to witness highly offensive acts of indecency (and thereby setting back their autonomy of choice and action).
- Disrupting worship: sets back the equal interest that all members of the community have in exercising their autonomy of worship. (Should be contrasted with blasphemy which does not affect either the welfare or the autonomy of others and is classed as a contested case for this, and other reasons, discussed in section 11.2.)

We should note that while both of these two categories of crimes are alike in the sense that they both offer us protection from certain kinds of harm to our interests in welfare and autonomy, they offer this protection on different grounds and extend it differently to two different classes of persons. The different factual foundations underlying the three different kinds of crimes also account for the second main difference between them which is revealed when we leave the dimension of harm and turn to identify the contrasting fault elements that are associated with each of these classes of crime, but before moving on to consider the second dimension of respect, I will summarise the steps in the analysis of the dimension of harm that the equality based model of a crime has produced.

The Factual Dimension of Harm

Recognising the sources of our equal vulnerability to suffering harm

This analysis identifies the sources of our equal vulnerability to suffering harm through the conduct of others by recognising the interests that we share equally with others. It also identifies any sources of factual inequality that may render a person more vulnerable to suffering harm through setbacks to those equally shared interests.

1. Each person in a community shares a common, equal, identity with others:

- as a human being;
- as a member of a political community governed by the state; and
- as an animal.

2. This shared identity gives rise to a set of equally shared factual interests.

As human beings, each one of us shares an equal interest with others in:

- life;
- basic welfare; and
- basic autonomy.

As members of a political community, each one of us shares an equal interest in:

- participating in the community's political processes; and
- benefiting from community services, facilities and resources.

As animals, each one of us shares an equal interest in:

- basic welfare (but not autonomy); and
- existence as a species.

3. Conclusion

Our shared and equal factual interests means that each of us shares a vulnerability to suffering harm if those interests are set back by the conduct of others.

4. Recognition of exceptional cases based on factual inequality.

We also recognise the special status of some human 'others' arising from their factual inequality, which creates a special vulnerability to suffering harm.

- A foetus is seen as being:
equal as human life, but not factually equal as a separate human person.
This lesser status leads to lesser protection.
 - A child is seen as being:
equal as a separate human person, but disadvantaged by factual immaturity.
This equal status and special vulnerability leads to greater protection.
 - A person of unsound mind is seen as being:
equal as a human person but disadvantaged by mental illness or incapacity.
This equal status and special vulnerability leads to greater protection.
-

10.4 The normative dimension of respect

When we move on from analysing the ways in which we have recognised our factual interests and protected the equal vulnerability to suffering harm that we share with others because of our common nature as human beings and our common identity as members of the community, and turn to consider the normative dimension of respect, we find, as we might expect, that the same general aspect of wrongdoing is replicated within each of these different categories of crimes. Because our recognition of each kind of crime is based on the one foundational moral norm that requires us to respect others by treating them as equals, there is in this one sense ‘the same wrong in all crimes’.³² However, as we can see from Table 10.2, above, and Table 10.4, below, we can contrast the different categories of criminal wrongdoing by reference to the different factual foundations of equality upon which they rest, just as we can use those foundations to account for how we come to owe different duties to the different classes of ‘others’ whose equally shared factual interests are protected by the legal duties which the state has imposed upon us. The crimes of common humanity recognise the entitlement that each *human being* has in being respected and treated as an equal; the crimes of common community recognise the entitlement that each *member of the political community* has in being treated as an equal; and, in recognition of our equal interests in welfare and existence as a species, the crimes based on our common animal nature create a limited duty to treat all *animals* as equals (in those two particular respects).

The aspect of fault displays the same pattern. I argue that in the crimes of common humanity we find the offenders to be at fault because they have failed in a specific and direct sense to recognise and respond to the equal value of another person, as an *individual human being*; in the crimes of common community the offenders are seen as having failed in a more diffuse and general sense to respond properly to the equal value of others as *members of the political community*; and in the case of the crimes based on our common nature as animals the offenders have failed to recognise and respond properly to the equal value of *another animal or species* of animals.

³² Matravers M, *Justice and Punishment*, (Oxford University Press, 2000) at 77 makes this point as a criticism of Jean Hampton’s account of wrongdoing in ‘Correcting Harms’ (1992) 39 *UCLA Law Review* 1659, see section 9.4 in Chapter Nine at footnote 128 and footnote 30 in this Chapter. I suggest that this feature of my model, rather than presenting a flaw, represents one of its strengths.

Many traditional expositions of the concept of fault usefully refer to the state of mind of the offender and, inspired by the account of wrongdoing as harming another by choice, go on to explain the different concepts of intention, recklessness, knowledge and negligence. My approach to the issue of fault has been somewhat different. I suggested in Chapter Three that ordinarily the basis upon which we find a person to be at fault lies in the fact that their responses to their particular circumstances have deviated from those that are thought to be right. In Chapter Nine I expanded upon this everyday understanding of the term and argued that, in the criminal context, the reason why we might conclude that a person's responses have deviated from those that are thought to be right may be because they have failed to recognise or respond properly to the equal value of others. Despite the fact that we cannot discuss the aspect of fault fully at the legislative stage (because it is tied so closely to the particular factual circumstances that prevail at the time of a crime) I want to suggest that we can take one more step in our analysis of the concept of fault by considering how it is that we might come to infer, from our general reading of a person's conduct towards other human beings, that they have, in fact, failed to respect and respond properly to the equal value of others. I also want to show how this particular interpretation aids us in the legislative decision to criminalise different kinds of conduct and accounts for the different kinds of fault elements that are usually required in these different kinds of crimes.

This step is made possible because once we have identified the specific factual interests that we share equally with others, we can get much closer to identifying, from the generally known facts about these particular interests and the harm that is associated with them, the particular value judgements made by the persons who have engaged in conduct that invades or threatens those interests. We can also come closer to judging the attitudes towards the value of others generally displayed by these offenders, by considering the way that they have weighed the importance of their own desires against the interests which we all share both as human beings and as members of the community. In section 11.3, which reviews the defences, I will build once more upon this approach to assessing fault in the criminal law, so that when we turn to fault for the final time in Chapter Twelve, we will be in a strong position not only to give full factual content to this initially empty normative concept, but we will also be able to understand better the role that it should play in controlling the extent to which we should take the harm done by a crime into account when sentencing offenders.

One of the important differences between these three categories of crimes lies in the evidential basis upon which we can justify the conclusion that the offenders have failed to respect the equal value of others. These assessments can be made only in a general sense because at the legislative stage we are able to conceive of these offences only in a general or abstract fashion that is necessarily divorced from any individual facts and circumstances. However, despite this restriction, I want to suggest that we can, in this general and abstract sense, interpret any particular person's conduct that threatens the equally shared interests of others as being based upon that person's false assessment of their own value relative to the value of others.³³ I also want to argue that we can infer the existence of this false assessment of relative worth from the fact that, by acting towards others in such a way, those persons have rated the value of satisfying their own desires as outweighing the value of these special interests that we share equally with others.

I suggest that we read this attitude from a person's conduct – considered simply as conduct.³⁴ From our external point of view, these persons are seen as having acted as if their desires count for more than the interests of others and as if they themselves are of greater worth than others. This *prima facie* assessment of fault arises because the principle of equal respect prescribes that whenever the equal interests of two or more persons conflict or whenever one person's desires conflict with another person's equally shared interests, any use of fraud, force or coercion is ruled out and the only acceptable way to resolve the impasse is to resort to persuasion or to let the status quo prevail. The principle simply requires us to respect others by treating those special interests as being equal in value to our own – and if each carries equal weight, neither one can take precedence over the other. In most cases, therefore, we must refrain from acting if our conduct carries a risk to these interests,³⁵ and, because we also share the

³³ For similar views see Hampton J, 'Correcting Harms' above footnote 32 at 1677; Dubber MD, 'Rediscovering Hegel's Theory of Crime and Punishment' (1994) 92 *Michigan Law Review* 1601 at 1617-1618; Alexander L, 'The Philosophy of Criminal Law' in Coleman J & Shapiro S (eds), *The Oxford Handbook of Jurisprudence*, (Oxford University Press, 2002) 815 at 828-829; Batson DC, 'Justice Motivation and Moral Motivation' in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life*, (Cambridge University Press, 2002) 91 at 96.

³⁴ See discussion and references cited in section 3.3 in Chapter Three.

³⁵ The respect principle sometimes requires positive action: in affirmative duty categories protecting the vulnerable; in cases of gross negligence; and in 'failure to rescue' cases which I discuss below.

belief that in general it is not difficult to desist from these kinds of actions, the fact that the accused has acted *at all* is enough to give rise to a presumption of fault. This explains why the notions of wrongdoing and fault are so closely linked – because the *prima facie* inference of fault arises from our interpretation of the conduct itself.

In the case of the crimes based on our common humanity, the evidence upon which we base our assessment of the offender's fault lies in their false claim that their worth is greater than the worth of another human being, a claim which we infer from their conduct that threatens another's equally shared interests, and which we see as being directed specifically towards the other individual, as an individual. By preferring their own desires and failing to treat another person's interest in life, physical integrity or sexual autonomy as being equal to their own, offenders committing these crimes based on our common humanity are seen as having claimed that their personal value as a human being is greater than that of their particular victims.

By contrast, in the case of the crimes of common community, I suggest that we base our assessment that the offender has failed to respond properly to the equal value of others on the fact that by valuing their own desires above the interests which all community members share equally, they have claimed that their worth is greater than that of any and all of the other members of the community. Offenders who commit these offences (eg, by remaining in a one hour parking space all day long) are seen as having claimed that their worth as an individual member of the community is greater than that of anyone and everyone else. In these cases, the false claim of value is more diffuse because it is not seen as being directed towards any particular individual victim (as it is in the crimes of common humanity) rather, it is directed towards every other member of the community in a more general and inclusive sense.³⁶ So, for example, a man who commits a victimising crime based on our common humanity, like murder, rape, theft or grievous bodily harm, can be seen as having made and acted upon the false claim of value to the effect that, as an individual person, he is worth more than his specific victim, whereas a woman who commits a crime based on our common membership of the political community, like treason, abalone poaching, or social security fraud, can be seen as having claimed that she is worth more than anyone and everyone else in the community.

³⁶ In the case of animals, the offenders have valued their own desires as being greater than the interests that another animal has either in their welfare or their existence as a species.

Because it provides a more precise normative standard for assessing the conduct and attitudes of others that is based on the single notion of respecting the equal value of others, and because it defines more clearly the factual basis of equality underlying these assessments, the two dimensional model sharpens our focus on the role played by fault in the criminal law. Tony Honore has argued that ordinarily fault is imputed to a person 'who could have controlled the situation in which he was placed but failed to do so' and suggests that only 'someone who could in the circumstances have acted otherwise' can justly be held to be morally responsible for their actions.³⁷ By giving a more precise basis for our assessments that a person could and should have acted otherwise, the interpretation based on the good life values enables us to distinguish our everyday assessments about fault from those that we make in the criminal law. The wider range of positive values (like compassion, gratitude, kindness, charity, friendship, love, family ties, etc) that inform our everyday moral judgements about others means that we often find a person to be at fault if they have failed to perform a positive act.³⁸ By contrast, the single principle requiring us to respect others as equals that dominates the criminal law, generally requires only that we desist from acting when our conduct might threaten the special, equally shared interests of others.

This interpretation explains the close link between a finding of wrongdoing and a finding of fault. It also reveals that the conclusion that any given offender should have acted differently is supported by both factual as well as normative foundations that are themselves derived from our vision of the good life for human beings living together. The normative principle of respect justifies the moral basis for the judgement; and the factual harm based dimension allows us to identify the particular kinds of conduct that manifest a failure to respect the equal worth of others. By acting upon these false assessments of their own importance and conducting themselves so as to threaten the interests that they share equally with others, all offenders are seen as having failed to

³⁷ Honore T, *Responsibility and Fault*, (Hart Publishing, Oxford, 1999) at 18, emphasis removed, citing AJ Ayer, *Philosophical Essays*, (1954) at 27 (n.v.). See: Honore's further discussion at 32-38; Hart HLA, *Punishment and Responsibility*, (Clarendon Press, Oxford, 1984) at 22-23, 160-161, 181; and Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 29.

³⁸ For example: we might criticise a friend who arrives two hours late for a dinner party for not phoning ahead to let us know that they have been delayed; we might think less of an adult child for failing to look after an elderly parent; or find fault in those who buy themselves expensive luxuries because we think that they should have donated the money to charity instead.

recognise or respond to the equal value of others and so they are in that general sense held to be at fault. Once a specific crime has been committed by a specific offender, this false claim of value can be found either in the offender's subjectively expressed attitudes or in their conduct itself, but at the legislative stage it can be considered only on the basis of generalisations about the nature of the conduct in the abstract sense and the particular factual basis behind the decision to criminalise that conduct.

As we shall see in section 11.3 in Chapter Eleven on the defences (where I consider for a second time the foundations upon which we decide that an accused both could and should have acted differently in the particular circumstances) these prima facie inferences of fault that have been derived from the fact of a person's conduct can be rebutted or partly modified by further facts showing that they have actually respected the equal value of others. So, for example, in a case of a consented mercy killing by a devoted husband, we might modify our initial conclusion (arising from the offender's conduct in drugging and smothering his wife) that he had failed to respect his wife and treat her as an equal, by pointing to the fact that he acted reluctantly and against his own moral beliefs because of the desperate requests made of him by his wife, who did not wish to end her days in hospital, who wanted to die, and who was determined to die by one means or another.³⁹ These facts suggest that in this case the offender had actually put his own value as lower, and not higher, than the value of his wife, and therefore might warrant mitigation of his sentence.⁴⁰ In another case, an inference of fault arising from the fact that an accused had stabbed and killed another person, might be completely rebutted by evidence showing that the deceased had first attacked the accused with the knife in an attempt to kill him and that the accused had simply responded in self defence. In such a case, the accused could show that by responding in kind once the attacker had first demonstrated a failure to respect the accused's interest in life and bodily integrity, he had, in the temporary circumstances of emergency, treated the attacker as an equal – on the new and particular terms that were established by the attacker's conduct itself.

Once we link the factual harm-based interests protected by a specific crime to the false assessment of value manifested in the offender's conduct, we can understand

³⁹ Facts based on the Victorian case of *Maxwell* [2003] VSC 278 (24 July 2003) Coldrey J, and 'I Killed my Wife to Keep a Promise' *The Age*, 15 March 2003 at 4.

⁴⁰ I explain why I think we are right to convict in these circumstances in section 11.3.

better the nature of the different fault elements contained in each crime and this understanding can guide us in the legislative task of grading the seriousness of different crimes at the abstract level. Furthermore, once we move to the sentencing stage, our recognition of this link not only offers us a method of identifying the fact of fault, but a method of assessing the degree of fault displayed by an offender. In each case we can compare the specific object of the offender's desire with the particular interests threatened by the offender's conduct, and make our own evaluation of the relative importance of the specific interests (and desires) involved. At neither stage, however, can this approach to assessing the normative dimension of a crime be carried out unless the initial link to the factual dimension has first been made. The following samples of the value claims that we can read from an offender's attitudes or conduct illustrate how this approach, which weighs the value that the offenders themselves have placed on their own desires against the value that we as a community place on the interests that we all share equally, might work.

Sample value claims: crimes of common humanity

- Murder: "My hatred of you is more important than the interest that you have in life because I am worth more than you are."
"Because I count for more than you do, my desire to keep all of our house instead of divorcing you and sharing our assets counts for more than your interests in bodily integrity, in avoiding pain and fear, and in life itself." (Actual case)⁴¹
- Manslaughter: "Because I am worth more than you are, my desire to make money is more important than your interest in life and personal safety." (Actual case)⁴²
- Rape, sexual assault: "Because I am more important than you are, my desire for sexual pleasure (or to dominate and humiliate you) is more important than your control over your own sexual autonomy, your interest in body integrity, your ongoing emotional and mental wellbeing, and your capacity to form relationships of sexual intimacy and trust in the future."

⁴¹ Facts based on the Victorian case of *Whyte* [2002] VSC 146, Gillard J; (2002) 129 A Crim R 491, where D poisoned her husband with arsenic over a period from 1982 until his death in 1984.

⁴² This claim of value could be applied to any case of industrial or corporate manslaughter where unsafe workplace practices lead to the death of employees. It could also match the case where a people smuggler desiring to avoid detection closes off an air vent that allows his human cargo to breathe: see *Wacker* [2002] EWCA Crim 1944, [2003] 4 All ER 295, where 58 victims died.

- Grievous bodily harm: “Because I am worth more than you are, my hatred of you is more important than your ongoing interests in physical and emotional wellbeing.”
- Theft: “I am more important than you, and so my desire for this item (book, wallet, car, etc) is more important than your interest in controlling your own possessions, and in your level of material wellbeing.”
- Arson:⁴³ “Because I am worth more than you, my hatred of you counts for more than your interest in your home, in your life, and in bodily safety.”

Sample value claims: crimes of common community

- Parking offences: “Because I am worth more than everyone else in the community, my desire not to inconvenience myself counts for more than anyone else’s interest in using these community facilities.”
- Pollution offences: “Because I am worth more than anybody else, my desire to dispose cheaply of my industrial waste is more important than everyone else’s interest in drinking safe water and in living in a safe and sustainable environment.”
- Indecent exposure: “Because I am worth more than anyone else, my desire for sexual stimulation in the outdoors counts for more than the interest that everyone else has in using and enjoying public parks and streets.”
- Bribing an MP, electoral fraud: “Because I am more important than anyone else in the community, my desire to decide what government we shall have carries more weight than everyone else’s interest in having their votes count.”(Actual case)⁴⁴
- Dangerous driving, causing death by dangerous driving:⁴⁵ “Because I am worth more than anyone else, my desire to use my mobile phone (or to speed, or to enjoy

⁴³ We can contrast arson with the offence of setting fire to property, which is a crime of common community with a diffuse fault element: “Because I am more important than anyone else in the community, my pleasure in watching a bushfire burn is more important than the interest that every other person has in benefiting from our community’s natural resources as well as the interest that every other person and animal has in physical safety.”

⁴⁴ See *Rouse*, Unreported, CCA TAS, 19 October 1990, 64/1990 where, after a narrow election outcome of which he disapproved, a businessman attempted to bribe a newly elected MP to cross the floor in order to secure the election of the unsuccessful party supported by the businessman.

⁴⁵ The crime of causing death by dangerous driving is difficult to categorise because it appears to protect our basic interest in life which arises from our nature as human beings, yet dangerous driving is characterised by the diffuse attitude towards the value of others associated with the crimes of common community.

drinking alcohol) counts for more than the interests that everyone else has in using the community's roads in safety."

The more diffuse nature of the offender's faulty attitude towards others that characterises the crimes of common community may explain the tendency seen in our current criminal law to abandon the requirement for proof of a specific fault element in many of the regulatory crimes (which are generally found in the category of crimes based on our shared identity as members of a common community) but to include such a requirement in many of the victimising crimes (which are generally found in the category based on our shared identity as human beings). In the crimes of common community, we can infer the existence of the requisite diffuse degree of fault from the fact of the conduct itself, and we can ensure that any who have in fact respected the value of others can be protected from conviction by allowing them to raise a defence, like accident or necessity, that shows this to be the case. In the case of the crimes based on our common humanity, however, the frequent inclusion of special fault elements⁴⁶ can be explained not on the basis of the 'Aristotelian' account of criminal conduct as the intentional or reckless act of causing harm to another (which, as we noted earlier, does not provide a satisfying explanation of our legislative decisions as to the content and structure of the criminal law) but on the alternative basis that such a state of mind itself provides evidence that on a more fundamental level, the offender, as one human being, has failed to respect the equal value of another specific individual human being.

This interpretation is fortified by the observation that although the specific harm to a particular individual victim resulting from some of the crimes found in these different categories may be exactly the same, we respond to the cases differently. For example, the victim in a case of wounding may suffer the same harm as a victim who is injured by a person taking part in a riot or driving dangerously. The analysis based on the two dimensional model suggests that, while the harm may be the same, the reason why we have chosen to criminalise these different kinds of conduct and

⁴⁶ This discussion is focused on the legislative decision to criminalise and so I cannot analyse in any great detail the different kinds of fault elements that are found within each of the different modes of defining crimes. However, I suspect that further analysis might lead us to cross the 'frontier' into territory where, as Lacey and Ashworth have pointed out, our decisions 'are historically contingent' and not necessarily able to be rationalised by any theory: see references in footnote 17 above.

include different fault requirements within their definitions may be because of the different factual foundations of equality upon which they rest. Furthermore, the model's account of fault (as either specifically personal or more generally diffuse) may explain why we rate the seriousness of these crimes differently despite the fact that they may risk causing exactly the same kinds of harm to others.

This equality based analysis of the normative dimension of a crime suggests that the criminal law should not necessarily be seen as a community's special response to conduct that displays a defective attitude towards causing harm of a particular kind to another, as the 'harm plus culpability' mode of definition would suggest. Rather, it is better interpreted as a response to conduct which, because it threatens harm to the special, equally shared interests of particular kinds of others, is seen as displaying a defective attitude towards the equal value of others. The crucial point that determines fault in the criminal law is the fact that the attitude is directed towards the value of others, not that it is directed simply towards harming others. The crucial evidence that the responses have deviated from those that are thought to be right is found not in the offenders' intentions but in their false assessment of their own worth relative to that of others. And the crucial combination of facts and opinion that determines blameworthiness in the criminal law occurs when we interpret a person's conduct that threatens the factual interests that each person shares equally with others as reflecting a flawed attitude towards the equal value of others.

Far from denying the importance of the dimension of harm, however, this interpretation deepens our understanding of harm's significance in the criminal law and its role in the legislative decision. The fact that a person's conduct has threatened the equally shared interests of others is important to our reasoning process twice over. Conduct that threatens harm to the wellbeing of others initially assumes significance because welfare and autonomy are the two essential and incommensurable factual foundations of the good life for any human being. Once we have recognised the sources of our factual equality we are then in a position to identify the factual interests that we share and which render us equally vulnerable to suffering harm caused by the conduct of others. At the normative level, our recognition of the different ways in which an offender's conduct can threaten these equally shared factual interests is doubly significant: first because it helps us to identify specific examples of criminal wrongdoing and give factual content and political legitimacy to the empty norm that requires us to respect others and treat them as equals; and also because it allows us to

draw the *prima facie* inference that the offender is at fault for failing to recognise and respond properly to the equal value of others. Most importantly, we cannot proceed to criminalise conduct unless the link between these two dimensions can be established.

Despite the importance of the dual role played by the concept of harm, the analysis produced by the two dimensional model suggests that the distinctive source of our grievance against those who offend against these norms of conduct lies not in the fact that their conduct may actually have harmed others, but in the single unifying fact that by acting at all they have failed to respect others and treat them as equals. We are outraged by a murder or a rape or a robbery, not just because the victims are worse off, but because at a more fundamental level we are convinced that no human being should treat another human being that way. We are offended by those who use up a one hour parking space all day long, who take more than their quota of scallops, or who sabotage our democratic electoral processes, not necessarily because we ourselves are prevented from using that particular parking spot, or because our own chances of catching the shellfish are reduced, or because we see one particular candidate from one party defeating another favoured candidate and taking office after an election, but because at a deeper level we believe that no single member of the community should treat the other members of their community in such a way.⁴⁷

In every case it is the meaning that we ascribe to the conduct, and the particular attitude towards the value of others that we see manifested in that conduct, which explains our communal outrage and justifies our view that it is wrong. It cannot be the threat of harm alone that makes the conduct wrong. If it were simply the fact that the conduct threatens another's factual wellbeing that made it wrong, we would have to extend the boundaries of the criminal law much further than we do now. Furthermore, this outrage arises whenever we interpret a person's conduct as reflecting a flawed attitude towards the value of others, and, significantly, it arises whether or not the harm threatened by the conduct ever eventuates at all. If the threatened harm does actually occur we experience an additional, independent sense of grievance and as a community we feel constrained to respond to that harm both within the legal system

⁴⁷ This interpretation of all crimes (not just the victimising crimes) can be contrasted with that of Duff, which I discussed in detail in section 7.1 of Chapter Seven. Duff suggests that we cannot separate the harm or the sense of violation from the wrong; I argue that we can and that the good life model shows us how to do it.

and in other extra-legal ways. However, I suggest that the single source of our communal sense of outrage that unifies all of these cases is found in the primary normative dimension, and I would argue that while a consideration of the factual harm based dimension is an indispensable component of the reasoning process that gives content to our laws and substance to our assessments not only of harm, but also of wrongdoing and fault as well, the key to understanding the special nature of wrongdoing and fault in the criminal law lies not in our assessments of the possible effects of the conduct but in our affective response to the very fact that this kind of conduct which carries this special meaning has occurred at all.

While the model accounts for our feelings of outrage, it also suggests that it is not simply the fact that we are outraged which justifies our legislative and punitive responses. By pointing up more clearly the source of our outrage, the model gives us a justification for our responses that depends not on the existence of our emotions, but on the unifying principle that gives reason – and political authority – to our emotions. It is not the mere fact that the conduct has threatened or even caused any particular harm that gives rise to our primary, unifying and communal sense of grievance and our conclusion that the conduct is wrong, but the fact that the primary norm of conduct derived from our vision of ourselves as equals has itself been outraged by the very occurrence of the conduct. We are therefore justly outraged as a community because the norm of equal justice that defines us as a polity has itself been outraged. This means that any search for a distinctive litmus test that can mark out as criminal, a special feature of the effects of the conduct or the special intentions of the offender, is doomed to failure, because we ourselves are the litmus. It is our developing vision of the good life that provides the ever changing factual substance and the uniting normative force behind the criminal law; it is our interpretation of the meaning of the conduct of others and our perception of the attitudes underlying it that determines blameworthiness; and it is our conviction that we must respond to conduct that is inconsistent with our shared belief in our equal moral worth that drives the criminal law. This analysis of the respect-based dimension of a crime suggests that, at its normative heart, our criminal law contains a distinctive conception of justice that requires equal treatment of equals by equals. It also suggests that the best guidance to our legislative decisions as to the content of the criminal law, summarised in Table 10.4, can be found in recognising and linking together our vision of ourselves, not only as morally equal to one another, but as factually equal to one another as well.

The Normative Dimension of Respect

Giving content to our entitlement to be treated as persons of equal value

This analysis gives factual content to our primary moral entitlement to be respected by others and treated as an equal by linking it with the conduct of others that threatens our equally shared factual interests. All crimes are based on this single moral foundation, but they can be divided into three categories depending on the different factual foundations that have led us to recognise the conduct as being criminal.

1. Criminal Wrongdoing

In our community, criminal wrongdoing is conduct that is interpreted as deviating from the primary norm requiring each person to respect others and treat them as a person (or being) of equal dignity, worth and value. This interpretation is based on the fact that the conduct has threatened the interests that each person (or being) shares equally with others by virtue of their shared factual identity and equal moral status as:

- a human being (the crimes of common humanity)
- a member of the community or (the crimes of common community)
- an animal (the crimes of common animal nature).

2. Criminal Fault

A person is seen as having failed to recognise and respond properly to the equal value of others if they have rated the importance of their own personal desires as being more valuable than the particular interests that they share equally with others. Our assessment of fault is based on the offender's false evaluation of his or her own relative worth which we infer from the fact of their conduct itself. This *prima facie* inference can be rebutted (see Chapter Eleven, on the issue of the defences). The offender's false claim of value is directed differently, depending on the kind of crime.

Offender's false claim of value

My desires count for more than your interests which we share in equal measure, because I am worth more than:

- you as an individual human being
(*specific* fault element characterising crimes of common humanity)
 - anyone and everyone else in the political community
(*diffuse* fault element characterising crimes of common community)
 - any other animal or species
(fault element characterising crimes of common animal nature).
-

TABLE 10.4 UNDERSTANDING THE LEGISLATIVE DECISION

Crimes of Common Humanity	Crimes of Common Community	Crimes of Common Animal Nature
<p>1. SOURCE OF EQUALITY</p> <p>Our shared factual identity and equal moral status as human beings.</p> <p>2. THE HARM DIMENSION: Equal Interests</p> <p>Each human being shares an equal interest in:</p> <ul style="list-style-type: none"> • pursuing and enjoying their basic welfare; and • exercising their autonomy. <p>3. THE DIMENSION OF RESPECT: Equal Value</p> <ul style="list-style-type: none"> • Wrongdoing <p>Conduct that breaches the norm requiring each person to respect the entitlement that each <i>individual human being</i> has in being treated as a person of equal value.</p> <ul style="list-style-type: none"> • Fault (specific) <p>A personal failure to recognise and respond properly to the equal value of <i>another human being</i>, evidenced by valuing one's own desires above the basic interests which all human beings share in equal measure.</p> <p>False Claim of Value</p> <p>"As an individual human being, I am worth more than you are."</p> <p>4. RESULTING DUTY</p> <p>Applies to each human being and is owed to all other human beings.</p>	<p>1. SOURCE OF EQUALITY</p> <p>Our shared factual identity and equal moral status as members of a community.</p> <p>2. THE HARM DIMENSION: Equal Interests</p> <p>Each community member shares an equal interest in:</p> <ul style="list-style-type: none"> • political participation (autonomy); and • using state facilities, services and resources (autonomy and welfare). <p>3. THE DIMENSION OF RESPECT: Equal Value</p> <ul style="list-style-type: none"> • Wrongdoing <p>Conduct that breaches the norm requiring each person to respect the entitlement that each <i>member of the community</i> has in being treated as a person of equal value.</p> <ul style="list-style-type: none"> • Fault (diffuse) <p>A personal failure to recognise and respond properly to the equal value of <i>all other members of the community</i>, evidenced by valuing one's own desires above the interests which all community members share in equal measure.</p> <p>False Claim of Value</p> <p>"As a community member, I am worth more than anyone and everyone else."</p> <p>4. RESULTING DUTY</p> <p>Applies to each member of the community, and is owed to all other members.</p>	<p>1. SOURCE OF EQUALITY</p> <p>Our shared factual identity and equal moral status as animals.</p> <p>2. THE HARM DIMENSION: Equal Interests</p> <p>Each animal shares an equal interest in:</p> <ul style="list-style-type: none"> • welfare; and • existence as a species. <p>3. THE DIMENSION OF RESPECT: Equal Value</p> <ul style="list-style-type: none"> • Wrongdoing <p>Conduct that breaches the norm requiring each person to respect the entitlement that each <i>animal</i> has in being treated as a being of equal value, that we choose to protect.</p> <ul style="list-style-type: none"> • Fault <p>A personal failure to recognise and respond properly to the equal value of <i>another animal or species</i>, evidenced by valuing one's own desires above the basic interests which all animals share in equal measure.</p> <p>False Claim of Value</p> <p>"As one animal, I am worth more than any other."</p> <p>4. RESULTING DUTY</p> <p>Applies to each human animal and is owed to all other animals.</p>

I have argued that the feature which unifies the criminal law in modern western liberal democracies and marks it out as unique is our vision of ourselves as equals. While all communities share an understanding of the ordinary concept of wrongdoing as conduct that deviates from a rule, norm or standard that is thought to be right, the actual content and boundaries of the criminal law vary across time and cultures. This observation led Glanville Williams to argue that the definition of a crime in the abstract technical sense cannot give us any direction as to the specific factual content of any particular set of criminal laws, but as this examination of our own criminal justice practices has shown, it is nevertheless possible for each community to arrive at an interpretation of their own criminal law that does offer some guidance as to the principles that may justify its content. In our own particular cultural and political community, it appears that the critical factor that leads us to identify conduct as criminal wrongdoing is the fact that we see it as a deviation from the primary norm that requires each person to respect others by treating them as equals.

This is not an historically accurate description of the actual processes that have led to the creation of our current criminal justice system. Certainly, the legislators and judges who have made our laws over many centuries did not consciously have this vision as their goal. However, this interpretation does offer us a justification of our practices that allows us to see the underlying sense that gives contemporary meaning and political legitimacy to our criminal law. Furthermore, this vision can guide our own legislative and punitive conduct as we seek to do equal justice within our current criminal justice system and to act consistently and fairly to those whose conduct we object to on the grounds that they themselves have failed to do equal justice to others. This model of a crime not only explains and justifies our criminal laws, but, because it is based on the two dimensional model of the good life for human beings who live together in a community and who recognise each other as equals, it also provides us with a single normative standard which we can use within the criminal justice system to judge the conduct of all those within the community of equals. Most importantly, this standard (which originates from our mutual recognition of our factual, moral and political equality rather than from any particular theory of ethical value) can be applied not only to judge the conduct of natural persons, but, as I will argue in the next chapter, it can also be used to guide and control the conduct of the most powerful person in the community – the state itself – which exists to protect the entitlement of each person in the community to pursue and enjoy the good life together as equals.

10.5 The significance of harm and its dual role in the criminal law

While the normative dimension provides the key to unifying our criminal law, it is the factual harm-based dimension that differentiates one criminal law from another. So, although our recognition of ourselves as equals allows us to justify our practice as a whole, the process that allows us to justify the existence of each one of our criminal laws requires us first to identify the different sources of our factual equality and then to recognise the range of different interests that mark us out as equals. I have argued, therefore, that the concept of harm plays a critical role not only because it gives factual content to our legislative decisions but also because, once we have identified the interests that we share in equal measure, we are able to give a more precise form to our assessments of wrongdoing and fault that can distinguish the judgements that we make in the criminal law from those that we make in everyday life. Without the factual dimension, neither the good life nor the criminal law can have any substance. But without the normative dimension of respect, our criminal law would have no moral heart and its reach would spread too far. However, we should also remember that while our recognition of the fundamental norm requiring each person to respect others by treating them as equals can guide us in our legislative decisions, this interpretation of the unifying moral principle behind the criminal law does not solve all of our legislative problems or eliminate the role of choice and selection as we move from the principle's abstract formulation to its particular factual applications.⁴⁸ Neither does it relieve us of the responsibility of justifying our legislative decisions when we make the choice to protect a particular factual interest through the criminal law or excuse us from explaining each time the basis of our decisions to use hard treatment to protect our mutual project of living the good life together.

Although the factual concept of harm plays an indispensable part in our legislative decisions to criminalise conduct, it is the normative principle that provides the primary logical and conceptual foundation for those decisions. This means that the actual *occurrence* of harm itself is not the critical issue when we determine the general question of criminal wrongfulness under the model. In order for the conduct to be recognised in the primary sense as criminal wrongdoing, it need only *threaten*

⁴⁸ Our changing assessment of the relative importance of our values and in the way we see ourselves as factually equal (and relevantly unequal) means that our laws (and our exceptions to those laws) are always being amended and improved.

harm to any one of our special equally shared interests, because this, in itself, is enough to provide the evidence that the primary moral norm has been outraged and to raise a *prima facie* inference of fault.⁴⁹ However, as we know, the causing of actual harm is often an important part of our decision to convict a person of a particular crime, and, if the model of the criminal law based on the good life values is to offer us a useful interpretation of the criminal law, it should be able explain why this is so.

I have suggested that at the stage where we recognise the special nature of wrongfulness and fault in the criminal law, the concept of harm plays an essential role in helping us to give practical form to our decisions. But while this assisting function is essential to the first step in the legislative process, it does not exhaust harm's role in the criminal law. Neither does it exhaust its role in the legislative task of defining each particular crime. Our criminal law responds not only to the threat of harm, but, just like the double faceted conception of the good life that it envisions and protects, it also takes account of any actual harm that may flow from the commission of any crime. This is because the good life that we want for ourselves is one that is lived and experienced; it is not an abstract life that is merely dreamed about or aspired to in our imaginations. Furthermore, the term 'good' contains two dimensions – the factual and the normative – each of which contributes something different to our conception of the 'good life', and neither of which is enough to satisfy us on its own. So, even though I have argued that any conduct that threatens harm to any of our equally shared interests is enough *as a minimum* to constitute a fully realised act of criminal wrongdoing,⁵⁰ it does not follow from this conclusion that actual harm to any of the threatened interests that may result from any of these acts of criminal wrongdoing

⁴⁹ Heidi Hurd argues in 'What in the World is Wrong?' (1994) 5 *Journal of Contemporary Legal Issues* 157 at 160 and 193 that our moral norms attach the property of moral wrongfulness only to completed actions like killing, raping, stealing and torturing, etc. My analysis proceeds differently, as I seek first to explain the meaning of the general conception of wrongdoing within the context of the criminal law as a means of distinguishing the special norms of conduct created by the criminal law from our everyday norms of conduct. I therefore distinguish between the reasoning behind the conception of criminal wrongdoing in the general sense and the reasoning behind the particular forms that we give to each particular criminal law itself – or between the essence of criminal wrongdoing (and the factor that leads us to recognise the conduct as being wrong) and the content of actual criminal laws (and the factors that lead us to us define each particular kind of criminal wrong in the particular way that we do).

⁵⁰ I will discuss omissions that constitute wrongdoing in section 11.2 of Chapter Eleven.

is therefore a mere irrelevance. When wrongful conduct also causes actual harm to others, it creates an additional source of grievance: first, because our understanding of the good life is not limited only to the normative dimension but extends to include the factual dimension; and secondly, because we aim through the criminal law not only to secure the ideal lives that we hope to lead, but to secure the actual lives that we do lead. At this point, the concept of harm re-enters our deliberations, but it takes on a different role, not as the midwife that assists us in giving factual – and politically defensible – form to the empty primary norm, but as an independently important factor that fills out our understanding of a crime as conduct that is interpreted as a failure to do equal justice to others because it threatens their equally shared entitlement to live a good life together with others within a community of equals.

The importance of this additional sense of grievance is illustrated by the fact that the criminal law defines many, but not all, crimes in terms of resulting harm, thereby marking out our concern for the special interests, like life and bodily integrity etc, that we value most highly. The moral heart of the criminal law requires equal treatment of equals by equals, but beyond that central normative concern, actual harm matters because welfare and autonomy are two of the essential elements of the good life that the state should protect. If these interests are an essential part of the good life for all human beings, then any harmful setback to those interests which actually results from any wrongful conduct is an important aspect of the criminal conduct and it must therefore be an important factor when we consider our responses to offenders. So, while I have argued that an appreciation of both dimensions is essential to the construction and legitimacy of our criminal laws – and argued that the normative dimension is paramount when we consider the unifying issue of wrongfulness – I also want to suggest that, if the purpose of the criminal law is to protect not just our vision of the good life, but the actual lives that we live, then we must take account of both the normative and the factual dimensions of the conduct that we have chosen to forbid. This means that the concept of harm plays a doubly significant role: not only is it indispensable to the realisation of the normative dimension of a crime, but once this primary foundation has been laid, actual harm is also independently significant in its own right. It suggests that the state is justified in taking harm into account when sentencing offenders and so answers one of the two questions about harm's role in sentencing posed at the beginning of this thesis. The matter of whether we should

impose any limits on the extent to which we can fairly track the harm done by a crime when sentencing offenders will be addressed in the final two chapters.

TABLE 10.5 THE SIGNIFICANCE OF HARM IN THE CRIMINAL LAW	
1. GIVING CONTENT TO THE EMPTY CONCEPTS OF WRONGDOING AND FAULT	
1.1	The concept of harm helps to give factual substance to the primary, but empty, norm of conduct that requires each person to respect others by treating them as equals, by assisting us to identify the interests that we share equally with others by virtue of our shared status as human beings and as members of a political community governed by the state, which mark us out as equals.
1.2	The concept of harm therefore guides us as we give particular factual – and politically defensible – content to the two empty normative concepts of wrongdoing and fault and allows us to differentiate the judgements that we make in the criminal law from those that we make in everyday life.
1.3.	<p>This facilitating role is essential to the unifying role played by the normative dimension of respect.</p> <p>Conduct that is objectively viewed as threatening harm to any of these special, equally shared interests is enough to constitute a fully realised wrong and to ground an inference of fault.</p> <p>The occurrence of actual harm is not necessary at the point where we are giving content to these two concepts of fault and wrongdoing, but this assisting function does not exhaust harm's role in the criminal law.</p>
2. COMPLETING THE CONTENT OF THE CRIMINAL LAW	
2.1	The concept of harm is independently significant in the legislative decision because the good life for human beings is comprised of three essential elements, two of which are the incommensurable harm-based elements of welfare and autonomy. Together, these two elements constitute the factual dimension of the good life that the state protects (in part) through the criminal law.
2.2	The good life that we desire for ourselves is not an imagined life, but a life that is lived and experienced. Our conception of the good contains two essential dimensions, the factual and the normative, and the criminal law, which exists to protect the equal entitlement that each of us shares in actually pursuing, living and enjoying the good life together, cannot ignore either one of these dimensions of the conduct that it forbids.
2.3	This means any actual harm of the kind that is threatened by the forbidden conduct is independently significant in the criminal law and it will be relevant to sentence.
2.4	The issue that remains is to justify imposing limits on the extent to which the state can take the resulting harm into account. ⁵¹

⁵¹ I will deal with this issue in Chapters Eleven and Twelve.

Andrew Ashworth and Joel Feinberg have suggested that our criminal law contains a special conception of harm that can be distinguished from both the civil law's account of this contested concept and the everyday meaning of the term.⁵² I disagree, and in this chapter I have argued that we can arrive at a more satisfying interpretation of our current criminal law if we reject the extended normative accounts of harm and separate the normative aspects of a crime from its factual harm based dimension. The analysis produced by the good life model has shown that our criminal law is marked out, not by any special interpretation of the notion of harm, but by a distinctive account of the normative notions of wrongdoing and fault that is derived from our vision of ourselves as persons of equal dignity, worth and value, and by a special conception of justice that requires equal treatment of equals by equals.

This account of the criminal law – and the special conceptions of justice, fault and wrongdoing contained within it – is based on a recognition of our shared identity as human beings, our equal status as members of a particular political community and our mutual need to limit our behaviour in order to advance our shared project of living good lives together. The interpretation yielded by the good life model both explains how the forbidden conduct comes to be a matter upon which the community is entitled to take 'a shared and public view'⁵³ and justifies the involvement of the state in our criminal justice processes. It suggests that when the state characterises certain conduct as criminal, it should not necessarily be seen as protecting a set of 'concocted' community values (the issue that disturbs Peter Alldridge).⁵⁴ Rather, it should be seen as standing up for the particular value of each and every individual human being within our community and their primary moral and political entitlement to pursue and enjoy a good life together with others as part of a community of equals.

⁵² Ashworth A, 'Taking the Consequences' in Shute S, Gardner J & Horder J (eds), *Action and Value in Criminal Law*, (Clarendon Press, Oxford, 1993) 106 at 117; Feinberg J, *Harm to Others*, (Oxford University Press, 1984) at 105.

⁵³ See Marshall & Duff, 'Criminalization and Sharing Wrongs' above footnote 16 at 8, 13 and 21. I would not characterise a crime as a wrong done 'to us' as Marshall & Duff do, rather, I argue that it is the fact that we see ourselves as sharing certain interests and an equal moral and political value that allows the state to respond to conduct that threatens those special interests in our name.

⁵⁴ In 'Making Criminal Law Known' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 103 at 108-111, Alldridge suggests that we should not try to justify the criminal law by appealing to a 'concocted' set of shared values.

The model's two-part vision, which keeps separate the factual and the normative dimensions of both the good life and the criminal law and which focuses on the powerful role given to the notion of equality within those two dimensions, not only reveals the special normative heart of our criminal law as requiring each person to do equal justice to another, it also reveals more clearly the significance of harm's dual role in the criminal law. Initially, an understanding of harm and the nature of the factual elements of the good life is indispensable in giving structure, substance and political legitimacy to the otherwise empty and often contested concepts of crime, wrongdoing and fault. Then, once a crime has been committed, harm, in the form of a setback either to welfare or to autonomy, becomes independently significant because these aspects are two of the essential, incommensurable elements of the good lives that we aim to secure for ourselves through the criminal law.

This chapter has proved the capacity of the good life model to offer a plausible explanation of our current criminal law and has shown not only that it offers a better understanding of its structure and content than many rival accounts, but also that it is able to identify the special nature and defining characteristics of the conduct which we currently agree ought to be criminal. It gives us a language of harms, a language of wrongdoing and fault, and a special understanding of justice, each of which relies, not on a theory of retribution or utilitarianism, but on the facts about ourselves, our current political beliefs and the interests that we share as a result of our current ways of life. This chapter has presented an interpretation of the criminal law which is unified by our normative vision of our moral and political equality and which is differentiated by our recognition of the three sources of our factual equality with others and the range of interests that we share in equal measure with others as a result of our equal status and shared identity as human beings, as members of the community, and as animals. In the following chapter I will attempt to show that the good life model can also provide us with a source of principled limits that can be applied consistently at each of the separate stages of the criminal justice process and which can guide us in devising a coherent approach to controlling the legislative and punitive conduct of the state when it must do justice to those who have themselves failed to do equal justice to others.

Chapter 11

Evaluating Harm's Role:

Legislation, Conviction and Sentencing

11.1 Introduction

Andrew von Hirsch has suggested that the harm principle has served as a valuable way of 'keeping the scope of the criminal law modest',⁵⁵ but recently, commentators like Bernard Harcourt and Joel Feinberg have expressed concern that claims of harm have become so pervasive that the harm principle 'no longer serves the function of a *critical principle*' in our debates over the limits of the criminal law.⁵⁶ Andrew Ashworth, Douglas Husak and Nicola Lacey have also pointed to the need to curtail the seemingly relentless expansion of the criminal law and to devise a principled response to the crisis of over-criminalisation (in liberal eyes at least) which this expansion has caused,⁵⁷ and which the harm principle on its own appears to be unable to contain. I have argued that we should supplement the harm principle with a second principle that recognises the importance given by those of us living in western liberal democracies to our vision of ourselves as political and moral equals. Under the good life model there are, therefore, two controlling principles which must be satisfied before we can justly declare conduct to be criminal: the factual 'harm principle' and the normative 'equal respect principle'. Together, these principles identify the two

⁵⁵ von Hirsch A, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996) 259 at 259.

⁵⁶ Harcourt BE, 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109 at 113, original emphasis. Joel Feinberg in 'Harm to Others - A Rejoinder' (1986) 5 *Criminal Justice Ethics* 16 at 27 notes that he had not anticipated that harm-based arguments would be used in debates over conduct that is objected to on the grounds of offence or moralism.

⁵⁷ Ashworth A, 'Is The Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225 at 227-228 and 224; Husak DN, 'Limitations on Criminalization and the General Part of Criminal Law' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 13 at 20-21; and Lacey N, 'Social Policy, Civil Society and the Institutions of Criminal Justice' (2001) 26 *Australian Journal of Legal Philosophy* 7. The liberal perception that there is a crisis and that the criminal law ought to be curtailed is one that not everyone shares.

aspects of any person's conduct towards others that attract the legitimate interest of the wider community, and which entitle us to declare such conduct to be a criminal wrong on the grounds that it represents a failure to respect the primary moral and political entitlement of others to be treated as equals within a community of equals.

Before we can justly criminalise any conduct under the good life model we must first satisfy the 'harm to others' principle by identifying one of the factual interests that we share equally with others, which is directly threatened by the impugned conduct. The criterion of directness is necessary because, as we saw in Chapter Nine, if we track the consequences far enough, almost any conduct may be characterised as harmful to others. Harm is everywhere, and if the harm to others criterion were to remain unqualified, nearly every kind of conduct would attract the criminal sanction. We must also show that the normative 'respect for the equal value of others' principle has been satisfied. This requires us to show, first, that the conduct can be read as treatment of, or conduct towards, others (and is not merely conduct that may affect others for the worse), and secondly, that it is treatment of others that can unequivocally be seen as a failure to respond properly to the equal value of others.

This chapter has two aims, both of which relate to the guiding role that these two critical principles should play in our criminal justice system. The first aim is to see if these two criteria on their own are enough to provide us with the principled source of limits that we need, not only when legislating the criminal law, but also when convicting and sentencing offenders for their crimes – and the harm done by those crimes. The second is to assess our current practices at each of these three stages of legislation, conviction and sentencing to see whether one of these principles is seen as being more important than the other. If, as I will argue, we have given a higher priority of value to the equal respect principle, we can then justify using it to impose limits on the degree to which we can take the harm done by a crime into account when sentencing. Once these two tasks have been done and the model's usefulness has been fully tested, it will be possible to complete the good life model in the final chapter by using these two principles to organise and explain the sentencing process itself.

I will begin in section 11.2 by considering the problem of attempts and the act/omission distinction and finish by considering some of the contested cases at the outer limits of the criminal law that complicate our analysis in each of the three categories of crimes of common humanity, crimes of common community and the crimes based on our common animal nature. I conclude that these two principles not only help us to

identify the sources of our misgivings about the factual and moral borders of our criminal laws, but also that they can help us to resolve the issues in a way that avoids any role for paternalism or any reliance on conventional morality as a basis for legislating the content of the criminal law.

The final two sections will consider the later stages of the criminal justice process. Section 11.3 focuses on the choices that we have made when allowing defences to a criminal charge. Section 11.4 analyses some of the significant structural features of our punitive responses to those who have been convicted of crimes and contrasts them with the responses to wrongdoing and harm found in the civil courts. I argue that whenever we have had to choose between allocating priority to responding to the factual dimension of any given conduct, as opposed to responding to its normative dimension, we consistently and properly favour the normative over the factual. At the end of this lengthy process of testing the model, I conclude that it offers an interpretation of the purpose behind our current practices that is convincing enough to justify modelling our sentencing decisions upon it. Equally significant is the conclusion that the two-dimensional vision of the good life contained in the model provides us with a morally and politically acceptable justification for our current criminal law that is strong enough to allow us to avoid having to embrace either a utilitarian or a deontological account of right and wrong or having to adopt any of the prescriptions for dealing with harm that these theories would impose upon us. Consequently, in the concluding chapter of this thesis I will apply the harm principle and the respect principle to the sentencing process and explain how these two principles can resolve the final part of the problem of responding in a consistent and coherent fashion to the problem of harm within the criminal law.

11.2 Evaluating the limits on the legislative decision to criminalise

(a) Attempts

The account produced by the equality based two dimensional model suggests that crimes of attempt, which have long been a source of difficulty and debate both in the criminal law and in sentencing law,⁵⁸ should in most cases be seen as straightforward

⁵⁸ The following alphabetical list contains the contributions that I have found to be most helpful:

Alexander L, 'The Philosophy of Criminal Law' in Coleman J & Shapiro S (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford University Press, 2002) 815.

examples of criminal wrongdoing.⁵⁹ We would be justified in criminalising most completed and incomplete attempts under the good life model, provided that the conduct which constitutes the primary crime objectively risks harm to another by threatening an interest which we all share equally by virtue of our common identity as human beings or as members of the community. This is because, whether or not the threatened harm actually occurs, such conduct demonstrates the requisite failure to respect the equal value of others and satisfies both the harm based and the respect

Ashworth A, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1988) 19 *Rutgers Law Journal* 725; 'Taking the Consequences' in Shute S, Gardner J & Horder J (eds), *Action and Value in Criminal Law*, (Clarendon Press, Oxford, 1993) 106; 'Defining Criminal Offences Without Harm' in Smith P (ed), *Essays in Honour of JC Smith*, (Butterworths, London, 1987) 7; *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) 445-455.

Becker L, 'Criminal Attempt and the Theory of Crimes' (1974) 3 *Philosophy and Public Affairs* 262;

Crocker L, 'Justice in Criminal Liability: Decriminalising Harmless Attempts' (1992) 53 *Ohio State Law Journal* 1057.

Culver K, 'Analyzing Criminal Attempts' (1998) 11 *Canadian Journal of Law and Jurisprudence* 441.

Duff RA, 'Acting, Trying and Criminal Liability' in Shute S, Gardner J & Horder J (eds), *Action and Value in Criminal Law*, (Clarendon Press, Oxford, 1993) 75; 'Subjectivism, Objectivism and Attempts' in Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996) 19; *Criminal Attempts*, (Oxford University Press, 1996).

Feinberg J, 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It' (1995) 37 *Arizona Law Review* 117.

Fletcher GP, *Basic Concepts of Criminal Law*, (Oxford University Press, 1998) at 171-187 (Chapter 10, 'Attempts Versus Completed Offences').

Herman B, 'Feinberg on Luck and Failed Attempts' (1995) 37 *Arizona Law Review* 143.

Husak DN, 'The Nature and Justifiability of Nonconsummate Offences' (1995) 37 *Arizona Law Review* 151; 'Book Review: Attempts and the Philosophical Foundations of Criminal Liability' (1997) 8 *Criminal Law Forum* 293.

Kadish SH, 'The Criminal Law and the Luck of the Draw' (1994) 84 *Journal of Criminal Law and Criminology* 679.

Moore MS, *Placing Blame*, (Clarendon Press, Oxford, 1997) at 191-247 (Chapter 5, 'The Moral Significance of Wrongdoing').

Parker R, 'Blame, Punishment and the Role of Result' (1984) 21 *Am. Philosophical Quarterly* 269.

Perlman M, 'Punishing Acts and Counting Consequences' (1995) 37 *Arizona Law Review* 227.

Smith K, 'Review Article: An Objectivist's Account of Criminal Attempts' (1998) 61 *Modern Law Review* 438.

⁵⁹ I except the complicated issue of impossible attempts from this general statement.

based criteria.⁶⁰ So, rather than presenting a secondary or 'exceptional form of liability' as George Fletcher has suggested,⁶¹ these two kinds of attempts, once recognised as conduct that threatens the equally shared interests of others and manifests an attitude of disrespect towards the equal value of others, should be seen as fully satisfying the paradigm of criminal conduct as I have outlined it in this thesis.

The requirement of actual harm is secondary to the primary issue of criminal wrongdoing under the equality based account of a crime, and so its absence does not present any problems for criminalising either 'completed' or 'incomplete' attempts.⁶² By contrast, those, like Heidi Hurd, who see the property of moral wrongdoing as attaching only to completed actions like 'killing' or 'wounding', and who as a consequence do not classify attempts as 'wrongdoing', must advance other reasons for justifying the punishment of attempts: either because such conduct amounts to an independently culpable evil and is therefore another, separate, form of blameworthy conduct that is justifiably punished; or because such conduct must be criminalised in an instrumental way in order to deter would-be offenders from committing the 'real' completed act of criminal wrongdoing.⁶³ I would classify attempts as fully realised

⁶⁰ Joel Feinberg explains in 'Equal Punishment for Failed Attempts', above footnote 58 at 122-123, that the general risk of harm to others is enough to satisfy the legislative harm principle and that there is no requirement that harm should actually occur before a conviction can justly follow.

⁶¹ Fletcher GP, *Basic Concepts of Criminal Law*, (Oxford University Press, 1998) at 175.

⁶² Larry Alexander, in 'The Philosophy of Criminal Law' above footnote 58 at 832 defines a 'completed attempt' as occurring 'when one engages in conduct such that, if the facts are as one believes them to be or as one hopes them to be, one will have committed a crime.' At 835 he defines an incomplete attempt as occurring 'when an actor intends to commit a completed attempt in the future and has taken some steps short of, but in the direction of, committing that completed attempt'. Antony Duff, *Criminal Attempts*, above footnote 58 at 119, defines a complete attempt as one where 'the agent has done all she can do to commit the crime' by satisfying the 'last act' test but where the intended consequence has not eventuated, and contrasts it with an incomplete attempt, where the conduct 'falls short of the last act'. See also Ashworth, *Principles of Criminal Law*, above footnote 58 at 446.

⁶³ See references in Hurd, 'What in the World is Wrong?' above footnote 49, and also Moore, *Placing Blame*, above footnote 58. Those who see the 'intended doing of criminal harm as the paradigm of criminality' (Duff, *Criminal Attempts*, above footnote 58 at 363) and structure criminal offences primarily around the harm-plus-culpability mode also see the criminalisation of attempts as a secondary form of protection that strengthen this primary form of protection (see, eg, Ashworth, *Principles of Criminal Law*, above footnote 58 at 447). Duff examines the arguments for

wrongs, and would treat them in the same way as any other crime. For all crimes, including attempts, the minimum standard of criminal wrongdoing is fully satisfied once the conduct that is objectively read as threatening any of the protected, equally shared interests of others has taken place. So, even in cases where we have chosen to mark out a particular interest as being especially valuable by including an element of specific harm within the definition of a particular crime, the occurrence of actual harm is always secondary to the aspect of criminal wrongdoing.

I will explain how we would take harm into account under the good life model in Chapter Twelve, but I want to note here that the interpretation produced by the two dimensional model of a crime does not require us to treat the sentencing of attempts as a special case. Furthermore, the sentencing problem created by offenders who have been less successful than they might have been is not limited only to cases of unsuccessful attempts; it can often occur in crimes normally classified as ‘successful’. For example, many offenders who intend to wound their victim may cause less harm than they intended, or indeed, may cause less harm than their conduct has objectively risked. It is only when we classify one particular aspect (usually either harm risked or moral culpability)⁶⁴ as the sole touchstone of criminal desert that attempts – or any kind of conduct that causes less (or more) harm than the offender intended – become a sentencing problem. However, because my account classifies as relevant both of the harm based and the respect based dimensions of a crime and requires the methodical consideration of each one of the three aspects of a crime, I will suggest that all we need to do in order to sentence for all crimes, including attempts, is to find a way of organising the three concepts of wrongdoing, harm and fault into a hierarchy of principle. That task, which requires us to identify the relative priority that our criminal justice practices give to the two different dimensions of a crime, will occupy the rest of this chapter.

My view is that harm should play a double role in the sentencing process for all crimes, including attempts. At the legislative stage, the harm *objectively risked* by the forbidden conduct should be taken into account as one of the factors relevant to

criminalising attempts in Chapter Five of *Criminal Attempts*: ‘Why Have a Law of Attempts?’ at 116-143, and again in the final chapter at 362-366.

⁶⁴ Those who regard moral culpability as the sole touchstone of criminal desert must choose between ‘levelling up’ (and sentencing attempts at the same level as successful crimes) or ‘levelling down’ from our current positions: see Feinberg, ‘Equal Punishments’ above footnote 58 at 121.

setting the general penalty range for any given offence. At the sentencing stage, the degree of any *actual harm* caused in each individual case will be one of the relevant factors when the judge allocates each individual offender a punishment within that range. At both stages, the relevant harm that can be taken into account will initially be limited to setbacks only to the specific interests that are the objects of each particular law's protection, but this limit may be extended in certain specific cases, for example, where any individual offenders intend by their conduct to cause a particular harm that falls beyond that initial limit.

One of the benefits of adopting this account is that it allows us to assess the seriousness of all crimes in the same way, whether they are seen – in terms of their results – as incomplete, completed but unsuccessful, or fully successful crimes. It also suggests that in terms of wrongdoing, there is no real difference between 'completed attempts' and 'successful attempts'. Furthermore, because this model of the criminal law does not characterise criminal wrongdoing according to the 'harm plus culpability' or 'intention plus results' modes of definition, it does not require us to enter into the debates that attempt to distinguish between trying, doing, willing, acting, and succeeding.⁶⁵ An added benefit of adopting this account of the criminal law is that it may also assist us in solving one of the problems associated with incomplete attempts, namely, the issue of where, in the progression of events leading up to an attempt to commit a crime, the law should draw the line and allow both law enforcement officers and the courts to intervene.⁶⁶

I would argue that incomplete attempts may fairly be criminalised under the model, provided that, in the cases of personal victimising crimes, the disrespectful conduct has reached a stage where it can be seen as treatment of or conduct towards another, and, in the other cases, provided that it has reached the point where it threatens one of the interests that we share as members of the community or as animals. This would rule out the punishment of mere preparations or advance planning and I would suggest that we could draw the line where the law should intervene at the point where an objective external observer would form a legitimate expectation that some setback to any of the protected interests is imminent. Drawing

⁶⁵ See for example: Duff, *Criminal Attempts*, above footnote 58, Chapter Ten: 'Acting, Willing, and Trying' at 264-292; and Hurd, 'What in the World is Wrong?' above footnote 49.

⁶⁶ See Ashworth, *Principles of Criminal Law*, above footnote 58 at 447 and 450-453.

the line at this point would have the added advantage of allowing us to classify the attempt as actually harmful as opposed to being only potentially harmful, because, as we saw in Chapter Two, a person can be harmed not only if their actual states of active or passive wellbeing have been set back, but also in cases where the strength of their legitimate expectations of those future states has been diminished.

This interpretation of completed and incomplete attempts recognises that a person can be seen as having been harmed by an attempt if, as objectively assessed, any of that person's legitimate expectations of their future active or passive wellbeing have been diminished – even if it is only for a very short time. The fact that the harm may not have lasted for very long would be a relevant matter when sentencing, and would allow us to rank the relative seriousness of completed, incomplete and successful attempts on the basis not only of fault, but of harm as well.⁶⁷ As I discussed in section 7.1 of Chapter Seven, Antony Duff argues that 'to be wronged is to be harmed' and has suggested therefore that an attempt, as a wrongful attack, can be seen for that reason alone, as causing a special 'harm' to the victim.⁶⁸ My interpretation suggests that these attempts, whether incomplete or completed, are not only fully realised wrongs, but can in some circumstances also be seen as harmful – not because a wrong is a harm, but because the conduct has, for a defined time, made another person worse off in terms of their legitimate expectations of their future wellbeing.

The model suggests that we could also justify the punishment of some factually 'impossible attempts'⁶⁹ on the grounds that those who commit this kind of conduct

⁶⁷ It has been argued that we can distinguish between the seriousness of the different forms of attempt on the basis of fault or culpability: see for example, Andrew Ashworth, *Principles of Criminal Law*, above footnote 58 at 446-448, who suggests that 'the culpability of the incomplete attempter may be less than that of the complete attempter because there remains the possibility that there would have been voluntary repentance at some later stage'. I argue that we can legitimately distinguish on both grounds of fault and harm.

⁶⁸ See Duff, *Criminal Attempts*, above footnote 58 at 132, 340, 368; 'Subjectivism, Objectivism and Attempts' above footnote 58 at 37; *Intention, Agency and Criminal Liability*, (Blackwell Publishers, Oxford, 1990) at 112-113 and 202-203; 'Restoration and Retribution' in von Hirsch A et al (eds), *Restorative Justice and Criminal Justice*, (Hart, Oxford, 2003) 43 at 47.

⁶⁹ Impossible attempts present a difficult problem for all theories of the criminal law: see Duff's chapter on 'Impossible Attempts' in *Criminal Attempts*, above footnote 58 at 76-115, where he describes impossible attempts as 'a quagmire' at 76; Ashworth, *Principles of Criminal Law*, above footnote 58 at 453-455; and Alexander, 'The Philosophy of Criminal Law' above footnote 58 at

have demonstrated a lack of respect for the special, equally shared interests of others and have therefore satisfied the minimum requirements of criminal wrongdoing. In these exceptional crimes where the occurrence of the ultimate intended harm is factually impossible (for example: where a shooter fires an empty rifle at his victim, intending to kill and believing the rifle to be loaded) there would rarely be any punishment imposed on the secondary harm-based grounds, because the actual death could not have been realised. However, some actual harm could ensue in certain cases, if, for example, the victim, on seeing the offender firing the rifle directly towards her, either apprehended an imminent attack or suffered shock or some other adverse psychological or physical reaction.

A more difficult problem is the question of punishing attempts that are impossible because the 'law' that the accused was attempting to break was not, in fact, a law at all.⁷⁰ I have argued that our criminal law contains a particular conception of criminal wrongdoing that is limited both by the nature of the good life that we desire for ourselves and by the role of the state in securing that vision. Given that we are not trying to hunt down and punish moral wrongdoing and fault of every kind within our current criminal law, but only to respond to conduct that is seen as threatening one of our special, equally shared interests, I would suggest that these attempts should not be punished under the good life model. In the example given by Andrew Ashworth in *Principles of Criminal Law*, of the person who attempts to smuggle currency into a country that has no restrictions on its importation,⁷¹ the accused has not threatened any harm to any interest that the law-makers in the jurisdiction have thought to be worthy of protection. By contrast with the factually impossible attempts, such

837-839. The fact that the intended ultimate harm could not actually be realised in some cases need not prevent attempts in general from being criminalised under the model, but holding a person criminally responsible for a factually impossible attempt would require us to adopt the offender's view of the facts in these cases rather than the model's more usual point of view of the 'objective observer, knowing all the facts'. This shift in perspective may perhaps open the model to a charge of inconsistency, however, constraints of space prevent me from analysing this issue in more detail.

⁷⁰ See Larry Alexander's discussion of the hunter who mistakes the starting date of the hunting season in 'The Philosophy of Criminal Law' above footnote 58 at 837; and Andrew Ashworth's example of the would-be currency smuggler in *Principles of Criminal Law*, above footnote 58 at 455. I do not discuss the attempts to deal in stolen goods cases, which are dealt with by Duff in Chapter Three of *Criminal Attempts*, see references above in footnote 69.

⁷¹ Above footnote 58 at 455.

conduct, while disrespectful of the rule of law in a general sense, cannot be interpreted as an act of special disrespect to one of the equally shared interests which that community has marked out as essential to the pursuit of the good life. Under the equality based model, therefore, there is nothing to punish, and if the state had not previously acted to protect that interest, any punishment of that conduct would amount to retrospective criminalisation. So, we can distinguish the two kinds of impossible attempts on the grounds that only the factually impossible attempts are justly punished, because only these attempts are directed towards an interest which the state has decided to protect and which is shared equally by all within the community. However, it should be noted, that where legally impossible attempts are criminalised and punished, these offences represent crimes of pure disrespect, and this suggests that in those jurisdictions the respect-based dimension of a crime is given greater priority of value than the harm-based dimension.

(b) Acts and omissions

In my earlier discussion of the duties imposed upon us by the criminal law, I suggested that the principle of equal respect requires us to desist from action when our conduct threatens the special interests that we share equally with others. Our current criminal law reflects this principle and in the main criminal responsibility is imposed only for positive acts that threaten these protected interests. In some cases, however, the law does impose a duty of affirmative action, and the extensive debates over the moral distinction between acts and omissions and the justifiability of criminalising failures to act have raised many contentious issues, three of which I will use in this section to test the good life model of the criminal law. The three questions are: whether omissions can ever be characterised as harmful; whether we can ever justify imposing an affirmative duty to act; and whether we can justify imposing a duty of easy rescue (and, if we are justified in imposing such a duty, where we should draw the line of responsibility).

Michael Moore has denied that omissions (as 'absent actions') can cause anything at all, including harm; he has argued that only acts can be seen as causing harm, and maintains that there is a significant moral difference between actively causing harm and merely allowing an already certain harm to occur.⁷² I agree with the third of

⁷² Moore, *Placing Blame*, above footnote 58, Chapter Six: 'More on Act and Crime' at 251, 273 and 287; see also *Act and Crime*, (Oxford University Press, 1993) and the 1994 Symposium on this

Moore's propositions, but disagree with the first two. In Chapter Two, I applied the test derived from our ordinary understanding of the concept of harm to a number of cases of omissions and demonstrated that if we take account of expectations as well as actual states, omissions can in some circumstances be considered to be harmful events. So, although we cannot harm another merely by thoughts alone,⁷³ the examples given in sections 2.2 and 2.3 of Chapter Two do suggest that it is possible to harm another either by active or by passive conduct. This means that even if we agree that it is not possible for us to 'kill' or 'wound' another by inaction,⁷⁴ our failure to act to save another from death or danger can, in some circumstances, be seen as constituting a harmful event for which we may be held to be criminally responsible – provided that the second legislative principle of 'equal respect' can also be satisfied.

As I noted above, our current criminal laws do sometimes impose a duty of affirmative action, for example: parents (or those in a parental or caring role) must provide the necessities of life for their children; a person who creates a special danger to the lives or property of another may be responsible for any failure to reduce that particular danger; some failures in an undertaking to care for the particular interests of another may result in the imposition of criminal responsibility;⁷⁵ and crimes of animal neglect also punish failures to provide for the basic welfare of animals. It appears,

book in Volume 142 of the *University of Pennsylvania Law Review*. On the issue of omissions see also: Feinberg, *Harm to Others* (Oxford University Press, 1984) at 159-186; Ashworth, *Principles of Criminal Law*, above footnote 58 at 47-48 and 110-133; Honore AM, *Responsibility and Fault*, (Hart Publishing, Oxford, 1999) at 12 and 41; Smith P, 'Legal Liability and Criminal Omissions' (2001) 5 *Buffalo Criminal Law Review* 69; and Alexander L, 'Criminal Liability for Omissions: An Inventory of Issues' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 121.

⁷³ See discussion in section 2.1 in Chapter Two and 3.2 in Chapter Three, where I contrasted the fact that we cannot *harm* another through our thoughts alone, with the fact that it is possible to *wrong* another person in our thoughts. This important feature allows us to fix one part of the criminal law into place because the 'harm to others' principle mandates that mere thoughts, desires and mental planning of offences should not be criminalised (despite the fact that ordinarily we might all find such thoughts morally objectionable and classify them as wrongful).

⁷⁴ See Moore, *Placing Blame*, above footnote 58 at 274-277; Feinberg, *Harm to Others*, above footnote 72 at 126-186.

⁷⁵ Ashworth, *Principles of Criminal Law*, above footnote 58 at 47-48, see also 110-134. Ashworth notes the increasing legislative tendency to impose affirmative duties at 47.

however, that each of these cases may be interpreted as another equality based exception that is justified by our recognition of the special vulnerability to suffering harm to certain vital interests (in physical welfare and property) that these victims share because of their circumstances of special factual or circumstantial incapacity. In these cases, the obligation that the equal respect principle imposes on us to treat another's interest as being equal in value to our own requires us not simply to refrain from action, but to engage in a positive action in order to compensate for that special, and relevantly significant, incapacity – or factual inequality.

In the two cases of animals and children, the victims have, by comparison with the paradigm legal person (the adult of full capacity), a lesser or even a nonexistent capacity to provide the essentials of life for themselves. For this reason they are dependent on others of full capacity who have a duty to care for them. This duty is normally derived from a special relationship either of parenthood or custody (in the case of children) or of ownership or custody (in the case of animals). In these circumstances, the principle of equal respect, which requires those care-givers to treat these specially vulnerable beings as equals and to give their interests in basic welfare a value that is equal to their own, imposes a higher duty of affirmative action and this, as I suggested earlier, can be seen as compensating for that factual inequality and equalising the positions of unequals (as far as these particular interests are concerned).

The imposition of the affirmative duty in the remaining two kinds of cases can be justified on the grounds that these persons have by their own conduct created a temporary circumstance of special factual vulnerability in others of full capacity who are normally equally able to protect their own interests. In these cases, the victims, by comparison with the offenders, have been rendered less able to protect their vital interests in person and property by the conduct of the offenders themselves and so the principle of equal respect requires the creators of the danger to equalise the positions by affirmative action. In all four of these cases the extra duty of affirmative action is justified on two grounds: first, because of the victims' special incapacity to protect themselves from harm in respect of certain vital, equally shared, interests; and secondly, because of the circumstantial relationship of special responsibility that is derived from the fact of parenthood, ownership, an undertaking to treat another's interests as one's own, or a special causal act that has rendered the other more than usually vulnerable. Together these grounds satisfy the two legislative criteria of 'harm to others' and 'equal respect for others' and they suggest that, under the good life

model, the creation of the extra affirmative duty to compensate for these particular kinds of incapacity in these kinds of cases is justified.⁷⁶

In cases where there is no special relationship between the parties, but where there is, nevertheless, a situation where one human being is plunged into circumstances of special vulnerability or danger through no fault of another, the criminal law in most common law jurisdictions in Australia, Britain and the USA does not require an onlooker to engage in affirmative action either to offer aid to others in need or to rescue them from imminent peril.⁷⁷ By contrast, a number of European civil law systems have passed ‘bad samaritan’ statutes that punish such omissions.⁷⁸ Under the good life model of legislation, it does appear that we could in some circumstances justify imposing a duty to aid another. However, I will argue that the application of the two criteria of ‘harm to others’ and ‘equal respect for others’ would limit the scope of any such legislation only to cases where the rescue is easy and where it poses no significant risk to the life or bodily integrity of the rescuer.

The harm to others criterion would be met only in circumstances where an external observer would form a legitimate expectation of rescue. This in itself would limit the case to easy rescues because we do not normally expect that one person would risk

⁷⁶ The principle of equal respect does not require compensation for every kind of factual inequality. The special affirmative duties are limited to compensating for the special incapacity of these victims and their consequent vulnerability to suffering harm only in respect of the special interests which we all share either as human beings, as animals or as members of a community. For example, there is no duty requiring a person to refrain from exploiting another’s factual financial inequality in cases of ordinary economic competition, even if that person is responsible for causing the other’s bad position (perhaps by denying them credit). It is only where a person has threatened the fairness of the market itself – as opposed to another’s particular chances of success in that market that we impose criminal responsibility. The interest that we share equally in this case is the competitive interest in participating in the market on equal terms; it would be impossible for all participants to have a legitimate expectation of actual success as a result of their participation in the market.

⁷⁷ Menlowe MA & McCall Smith A (eds), *The Duty to Rescue*, (Dartmouth, Aldershot, 1993); Feinberg, *Harm to Others*, above footnote 72 at 126-186; Alexander, ‘The Philosophy of Criminal Law’ above footnote 58 at 864; Waldron J, ‘On the Road: Good Samaritans and the Duty to Rescue’ (2000) 40 *Santa Clara Law Review* 1053; Dressler J, ‘Some Brief Thoughts (Mostly Negative) about “Bad Samaritan” Laws’ (2000) 40 *Santa Clara Law Review* 971; Tomlinson EA, ‘The French Experience with Duty to Rescue’ (2000) 20 *New York Law Journal of International and Comparative Law* 451.

⁷⁸ See references in footnote 77 above.

their life or their own future wellbeing to save another, and indeed, the special recognition and praise awarded to those who do risk their own lives in dangerous rescues points up their exceptional nature. Jeffrie Murphy has given an example of an easy rescue case which is quoted and analysed by Joel Feinberg in *Harm to Others*:

I can be highly morally lacking even in cases where I violate no one's rights. For example, I am sitting in a lounge chair next to a swimming pool. A child (not mine) is drowning in the pool a few inches from where I am sitting. I notice him and realize that all I have to do to save him is put down my drink, reach down, grab him by the trunks, and pull him out (he is so light I could do it with one hand without even getting out of my seat). If I do not save him I violate no rights (strangers do not have a right to be saved by me) but would still reveal myself as a piece of moral slime properly to be shunned by all decent people.⁷⁹

By applying the analysis of harm developed in sections 2.2 and 2.3 of Chapter Two, which factors into our assessment process an appraisal, not only of the baby's actual state, but of his legitimate expectations as well, we can easily find that the callous pool lounge in this case had harmed the baby – even though we might not go so far as to say that he had actually drowned the child. My analysis of this case is presented in Table 11.1, below. Immediately after the baby had fallen into the pool an external observer would initially form an expectation of the child's death. Once the pool lounge had noticed that the baby was drowning, the strength of that expectation of death would be significantly reduced in these circumstances because ordinarily we would expect an able bodied adult to rescue the child. In this case we would certainly say that the strength of the expectation of death by drowning formed at (B) would be reduced in strength at the point when the pool lounge noticed the baby's plight. In fact, provided that the adult had noticed the baby's fall almost immediately, we would probably form a positive expectation at (C) that the baby's life would be saved.

⁷⁹ Murphy JG, 'Blackmail: A Preliminary Inquiry' (1980) 63 *The Monist* 168 (n.v.) cited by Feinberg, *Harm to Others*, above footnote 72 at 130. Much of Feinberg's analysis is focused on Murphy's approach to the rights issue. I argue that it is better not to focus on rights in these cases where the issue is whether or not to create a new legal obligation because it can introduce an element of circularity into the debate. In my view, legal rights and duties are the products of authoritative legislative and judicial decisions. Once a right or duty has been recognised, this fact can then become the basis of future decisions, but when the issue is whether or not to create a right or a duty, an argument like Murphy's that 'strangers do not have a right to be saved by me' merely begs the initial question that is to be determined. For a similar view, see Stapleton J, 'The Golden Thread at the Heart of Tort Law' (2003) 24 *Australian Bar Review* 135 at 136, footnote 7.

TABLE 11.1 MURPHY’S POOL LOUNGER		
[Premise: The pool lounge could save the drowning baby by putting down his drink, reaching down and pulling him out with one hand, without even getting out of his seat.]		
Event	Actual Physical State	Legitimate Expectation
1. Baby crawls into pool.	(a) fit and healthy ↓	(A) ordinary life expectancy ↓
2. Pool lounge notices baby’s plight.	(b) in physical difficulty	(B) death (from drowning)
3. Pool lounge does nothing.	(c) in physical difficulty	(C) legitimate expectation of rescue reduces the strength of the baby’s expectation of death and it may even create an expectation of life ↓
4. Baby dies.	(d) in physical difficulty ↓ (e) dead from drowning	(D) death (from drowning) (E) –

Once the lounge had decided to do nothing, however, the baby’s expectations of life would worsen at (D) and again we would expect death by drowning to occur. This second negative shift in expectations from (C) to (D) that follows upon the pool lounge’s decision to do nothing to save the baby allows us to say that his conduct constituted a harmful event, and, once the expectation of death created by that conduct at (D) was realised at (e), we would have established the three factual foundations for a further inquiry into the issue of fault and wrongdoing.⁸⁰

The significant fact in this case is the ease of the rescue. Without this feature we could not say that the conduct affected the baby’s expectations. If, for example, a child had fallen into a raging torrent at the height of a ferocious storm that had caused

⁸⁰ Following the pattern suggested in section 2.2 of Chapter Two, those three factual foundations are:

- that D has harmed the baby, as evidenced by the negative shift between (C) and (D);
- that D’s conduct made a significant difference to the baby’s final fate, as evidenced by the negative shift between the baby’s expectation of life created at (C) when lounge noticed the baby and the baby’s actual death at (e); and finally
- that the expectation of the kind of harm (death by drowning) that his conduct created at (D) was in fact realised at (e).

a river to break its banks and was being swept away by a terrifying rush of water, boulders and tree-trunks, we would not form any expectation of rescue. Regardless of the number of spectators who were present and had seen the child being tossed by the wild waters, we would not normally expect any of them to risk their own lives in a futile effort to try to save the child, and so in this example no legitimate expectation of life could be formed, and the decision of the spectators to do nothing could not therefore be classified as harmful.

The complicating factor in this case (which distinguishes it from the more straightforward case of 'Snakebite' given in Table 2.2 of Chapter Two) is that the pool lounge (unlike the doctor in 'Snakebite') had no pre-existing duty to act. Despite the fact that the baby was utterly vulnerable to the threatening harm and incapable of saving himself, there was no special relationship between the pool lounge and the baby: the lounge did not own the pool; he had not caused the baby's plight; and he had no other personal duty arising from any position of employment or other personal status. In this case the expectation of rescue is premised not on the existence of any special duty (like the doctor's duty to treat a patient) but on our knowledge of everyday norms of conduct: adults of full capacity do normally act to save drowning babies when it can easily be done. So, because the interest in this case is the equally shared, foundational interest in life itself, and because we can also establish that in easy rescue cases like this one an external observer would legitimately expect that the child would be saved, we can satisfy all of the legislative requirements set by the factual dimension of harm and we can turn to the second, normative dimension of respect.

Both Murphy and Feinberg conclude that the pool lounge's conduct in this case is morally wrongful,⁸¹ and if we apply the ordinary meaning of the term we would have to agree with their assessment – such conduct clearly deviates from a norm of conduct that is thought to be right. However, the model of the criminal law that I have developed in this chapter contains a more specific conception of fault and wrongdoing that requires us to satisfy two separate tests before we can justly legislate against any

⁸¹ The conclusion that the conduct would generally be seen as morally wrongful is agreed upon by both Feinberg and Murphy: see references in footnote 79 above. Feinberg's discussion of harm in this case is extremely complicated and involves identifying up to four different conceptions of each of the notions of harming and benefiting, see eg, at 137-143. I have already discussed and rejected Feinberg's approach to these matters in Chapter Two.

given conduct. The first test requires us to establish the existence of criminal wrongdoing. I have argued that in our community, criminal wrongdoing is conduct that is interpreted as deviating from the primary norm requiring each individual to respect others and to treat them as persons of equal dignity, worth and value, and I have suggested that we base this interpretation on the fact that the conduct has threatened one of the special interests that we all share equally with others by virtue of our shared factual identity either as human beings or as members of a community.

In the case of rescue, the interest that would be the object of the law's protection is our shared interest in life and bodily integrity and so, if we decide to criminalise this conduct, the failure to rescue another in peril would be classified as a crime of common humanity. However, any such law would have to be limited only to cases where the conduct can be interpreted unequivocally as threatening the interest of another, and as we have seen, a failure to rescue can be described in these terms only when the rescue is so easy that, as external observers, we would form a legitimate expectation that a rescue attempt would be made and would be likely to succeed. This example illustrates the important limiting role played by the concept of harm in our legislative decisions: first, we must establish that the protected interest is one that we all share equally by virtue of our common nature as human beings, members of a community or animals; and secondly, we must be able to show that the conduct covered by the proposed rule would in all cases threaten one of those interests.

The second test requires us to establish the existence of criminal fault. I have argued that a person is seen as being at fault in the criminal sense if they have failed to recognise and respond properly to the equal value of others and suggested that this can be evidenced by the fact that they have rated the importance of satisfying their own personal desires as being more valuable than the particular interests that they share equally with others. I have also argued that our assessment of fault is based on the offender's false evaluation of his or her own relative worth which we infer from the fact of their conduct itself. The case of an easy rescue falls into the category of crimes of common humanity and so before we could justly criminalise such conduct we would have to show that a failure to rescue another would be enough in all cases to ground an unequivocal inference of specific fault: that is, we must be able to find in all cases covered by the suggested rule, that the offenders would be seen as having claimed that their worth as an individual human being is greater than that of their individual victims.

I would argue that we can make a finding of specific fault in these cases, provided again that the law is limited only to those cases where the rescue poses no threat to the life or bodily integrity of the would-be rescuer. So, for example, in the case of the pool lounge we can easily read the false claim of value from his conduct: "Because I am worth more than this baby, my desire to continue sipping my drink and to stay dry is more important than the baby's interest in life." By contrast, the value claim that we read from the conduct of the onlookers in the case where the baby was being torn away by the raging river, cannot be described as false: "My life is worth the same as the baby's, and so I do not want to jump into the torrent and risk my life in order to try to save his." We cannot draw any inference of fault from this conduct, because the reason for staying in safety is not premised on a false assessment of the value of either the child's life or the onlooker's life. The failure to act is not a failure of respect.

In these circumstances the principle of equal value prevents us from judging the conduct of the onlookers in remaining in safety as demonstrating any kind of failure to recognise or to respond properly to the equal value of others. Their desire to protect their own lives in such circumstances is a legitimate desire upon which to base their conduct because it is not premised on a false assessment of relative worth. As in the previous cases, the application of the 'equal respect for others' principle operates to protect the lives of individuals, but in this case our belief that each human being is of equal worth protects not the drowning baby from death, but the onlookers themselves from having to risk their own lives. Their entitlement to be treated as persons of equal value entitles them to remain in safety. The 'equal respect for others' principle therefore provides a second limit on the legislative decision because a law that is premised on the equal value of each human being cannot prefer the life of one person over that of another: it cannot force one person to sacrifice their own life for the life of another or force them to value themselves as being worth less than others.⁸² The notion of equality, which normally requires us to desist from action when our conduct towards others is based on a false assessment of value, also requires the state itself to desist from legislative action in the same circumstances. In this way the equal respect

⁸² As we shall see in section 11.3, it can sometimes require a person to risk their life when the existence of the community itself is threatened, for example, in the case of war. The (false) value claim implicit in a dangerous rescue provision would read: "Because the victim of disaster is worth more than the spectators, the spectators must risk their lives to try to save the victim's life."

principle not only protects each one of us as individuals from the conduct of other individuals, but it also protects each of us from the legislative conduct of the state.

This discussion has shown that adopting the powerful concept of equality as a basis for setting community standards in the criminal law offers double protection to each individual within the community. The first source of protection derives from the fact that the principle requires each person to respect others as an equal and, by logical extension, to treat the other person's equally shared interests as carrying the same weight as their own. Normally this means that others must desist from action when their conduct threatens us, but as we have seen, in certain limited circumstances they must sometimes engage in positive action to protect us. The second source of protection offered by the principle of equal respect lies in the fact that it prevents us from being forced by state legislation to act as if we are worth less than others. This means that while the principle requires that no person may act as if they are worth *more than* another, it also has the consequence that no person can be forced by the state to act as if they are worth *less than* another.

In the test case of easy rescue, the equality based model of a crime would allow us to impose criminal responsibility upon an able bodied person who failed to go to the aid of another person in dire peril when that aid could be rendered without danger to the rescuer. In these cases of easy rescue we can unequivocally say that the conduct threatened harm to the vital interests of another and that in all cases it would be interpreted as being based upon a false claim of relative worth. So, even though we might not ordinarily say that that Murphy's pool lounge had actually 'drowned' or 'killed' the baby (as we would in cases of active conduct), we would say that he was partly responsible for the fact that the baby had died by drowning. We would also find that the conduct breached community norms in such a way as to fall under the operation of principle of equal respect, and in fact the inclusion of 'bad samaritan' statutes in European criminal laws is often portrayed as 'a recognition of the role of solidarity in the social life of a country'.⁸³

⁸³ Cadoppi A, 'Failure to Rescue and the Continental Criminal Law' in Menlowe MA & McCall Smith A (eds), *The Duty to Rescue*, (Dartmouth, Aldershot, 1993) 93 at 117. The penalties for such failures to rescue are generally low (see Cadoppi at 127-130), perhaps in recognition of the fact that a failure to rescue another from death is seen as being less culpable than a positive act that directly causes death, a point made by Michael Moore (see references in footnote 72 above).

The requirements imposed by the good life model of a crime would rule out any imposition of a general duty enforced by the criminal law to give economic aid to others suffering from poverty or other adverse circumstances – an outcome which is feared by many who oppose the ‘bad samaritan’ statutes.⁸⁴ This is because, as we have seen, the law based on the equal worth of each person’s equally shared interests cannot value one individual’s interest in financial welfare and autonomy of possession as being worth less than that of another.⁸⁵ So, while a person is free to give to charity (because the choice to dispose of possessions is the essence of the concept of possession), the criminal law cannot force anyone to part with their money to ‘rescue’ another poorer individual. This does not mean that a community may never introduce a system of redistribution of wealth, merely that it cannot introduce it through a criminal law that imposes a duty to aid others in cases where a rescue is easy.

The preceding discussion of acts, omissions and attempts has demonstrated how the two good life principles of ‘harm to others’ and ‘equal respect for others’ can resolve some of our difficult legislative problems concerning the content of the criminal law. The conclusions that I have drawn from this discussion suggest that it is possible to expand upon those two principles as follows:

- **The nature of the interest**

The protected factual interest in either welfare or autonomy must be one that we all share equally with others by virtue of our common nature either as human beings, as members of the community or as animals.

- **The effect of the conduct**

The conduct covered by the rule must in all cases be interpreted as threatening or risking harm to one of those equally shared factual interests.

- **The meaning of the proscribed conduct**

The conduct covered by the rule must in all cases be seen as treatment of or conduct towards the other person whose equally shared interest is threatened by the

⁸⁴ Michael Menlowe summarises the counter-arguments that suggest that a duty of easy rescue would force us to offer financial aid to the poor and justify the coerced redistribution of wealth in ‘The Philosophical Foundations of a Duty to Rescue’ in Menlowe MA & McCall Smith A (eds), *The Duty to Rescue*, (Dartmouth, Aldershot, 1993) 5.

⁸⁵ We do make an exception to this basic proposition in the case of taxation, where the existence of the community itself justifies an intrusion into the individual’s interest in autonomy of possession. For the same reason we make another exception in times of war; where the existence of the community itself is threatened we require individuals to risk their lives for the sake of the state.

conduct and that conduct must be able to be interpreted unequivocally as a deviation from the primary norm requiring each person to respect others and treat them as a person of equal dignity, worth and value.

- **The fault element**

The conduct covered by the rule must be enough in all cases to ground an inference of fault, either specific or diffuse.

For example, we must be able to find that in all cases covered by a suggested rule in the category of crimes of common humanity, that the offenders would unequivocally be seen as having acted as if their worth as an individual human being is *greater than* the relative worth of their individual victims.

- **The value claim implicit in the law itself: a limit on state legislation**

While the criminal law generally forbids any person from acting as if they are worth *more than* others, the state's criminal laws must not require any person to treat their own protected interests as being worth *less than* those of another because the criminal law is premised on the equal value of each and every human being. This protects us from the legislative conduct of the state itself.

- **The effect and form of the law: acts and omissions**

The principle of equal respect for others normally requires us to desist from action when our conduct threatens the equally shared interests of others. However, in some limited circumstances, it requires those of full capacity to engage in positive action to equalise the positions of certain classes of others who are factually incapable of protecting their own interests.

(c) **Contested cases**

I have argued that, although the common and unifying thread running through all of our decisions to criminalise any given conduct lies in our normative vision of ourselves as beings of equal moral worth, we cannot ignore the factual harm-based dimension of the conduct that we have forbidden. I have also suggested that before we can give contemporary meaning and a justifiable purpose to our current criminal law and criminalise any given conduct we must satisfy both the harm principle and the respect principle. Before moving on to consider whether this interpretation of the criminal law can also help us to understand the rules that govern the decisions that we make during the trial, at the time of the verdict and when we sentence offenders, I want to see if this equality based model can help to identify and resolve the reasons behind our misgivings over a number of controversial and contested cases that have tested our legislators and troubled our theorists. The discussion in this section will necessarily be limited, and rather than discussing in detail the arguments made by others who have debated these issues, I will confine my discussion to applying the

refinements of the two principles of 'harm to others' and 'equal respect for others' identified above to a large number of these contested cases.

Crimes of common humanity

Table 10.3 listed some of the contested cases that have given rise to debate over the current content of the criminal law. Within the crimes of common humanity the contested cases are: abortion; adult incest; consensual slavery; voluntary euthanasia or assisted suicide, consented maimings, wounds or assaults; prize fighting, boxing, 'gladiatorial' and dwarf tossing contests; and misconduct with human corpses.

Abortion

Cases of abortion can be questioned under both the harm principle and the equal respect principle and these objections account for the fact that in many jurisdictions abortion is not the subject of a total prohibition and many exceptions are uniformly allowed, for example, when the life or health of the woman carrying the foetus is threatened by the pregnancy. Under the 'harm to others' principle, it can be argued that the foetus, while recognisably human *life*, is not fully a human *person* until it has been born and becomes capable of existence independent of the body of the woman who carries it. It is possible, therefore, under the 'harm to others' criterion, to challenge the equal status of the foetus as 'another human person'.

The crime of abortion, as a crime of common humanity, requires us to show, before we can justly criminalise the conduct, that in all cases, the conduct covered by the rule would be enough to ground an unequivocal inference of specific fault. The difficulty is that we do not always agree that the woman is necessarily and always at fault if she values her own desire to protect her interests in physical, mental and psychological wellbeing and in personal autonomy more highly than the interest of the foetus to be carried to term and given independent existence. Certainly, in cases where the pregnancy threatens the woman's interest in life itself, the equal respect principle would preclude the state from valuing the worth of the foetus more highly than the life of the woman, and it could also be argued that it should also protect the woman's existing interests (as a fully independent human person) in welfare and autonomy as opposed to those of the foetus (as only a potentially independent human person). The unique difficulty in these cases arises from the fact that the woman and the foetus do not share an equal status. This distinguishes abortion from the usual cases where both parties do share an equal status either as individual human persons

or as equal members of the community. In these cases the task of applying the two equality based principles is much more straightforward because we are comparing like with like. This difference in status explains the difficulty that we have encountered as a community in coming to agreement upon our assessment of the relative value claims that determine fault, as the following examples illustrate:

“ My desire to protect my own interest in *life* is more important than the interest of the foetus in continued access to my body for the nourishment and protection that is needed to sustain its life.”

“ My desire to protect my own interest in *mental, emotional and physical wellbeing* is greater than the interest of the unborn but unviable foetus in continued access to my body for the nourishment and protection that is needed to sustain its life.”

“ My desire to protect my interests in *welfare and /or autonomy* is more important than the interest of the unborn and viable foetus in continued access to my body for the nourishment and protection that is needed to sustain its life.”

As I discussed above, these misgivings over the issue of fault, when combined with the unequal factual status of the foetus, account for the fact that the degree of protection that we offer to the foetus increases as it moves closer to the point where it is capable of attaining full equality as a human person with the woman who carries it. However, while the application of the model can explain many of our doubts about the crime of abortion and account for the reasons why we do not have an absolute prohibition on all abortions under all imaginable circumstances, it remains uncertain as to whether we will ever reach a point where we will choose to endorse an unequivocal rule that protects a woman's autonomy interest in every case where she might wish not to carry a foetus to term. This discussion has highlighted the role of choice, endorsement and cultural variation in the making of these value judgements that inform our legislative decisions and has illustrated the point that the combination of the equal respect principle and the harm principle cannot themselves resolve every legislative question. As I pointed out in my earlier discussion, the tests contained in the good life model are not just straightforward factual tests that require the simple application of a rule. In addition to using our intelligence, our reason and our factual perceptions, these tests require us to use our perceptions of value as well and for that task no rule is enough because when values are the issue, we ourselves are the litmus.

Incest between consenting adults

Unlike the cases of adult-child incest, which are justifiably criminalised under the two dimensional model, cases of consenting incest between adult parties are contested under both of the legislative principles. In cases where there is true consent given by adult partners of full capacity, incestuous conduct does not set back the autonomy interests of either party and cannot be considered to be harmful on that ground. Furthermore, unless we accept that sexual contact between close family members is necessarily a threat to the mental or emotional wellbeing of the immediate partners, such conduct does not appear to pose an unequivocal threat to any of the parties' welfare interests either. Such conduct is sometimes objected to on the grounds that it may risk indirect genetic damage to possible offspring. However, this kind of remote harm⁸⁶ to third persons not yet in being, and which is by no means certain to occur in all cases, is not enough to satisfy the harm principle. As we saw in Chapter Nine, harm is ubiquitous and once we allow any harm at all, however remote, to be a valid foundation for our decisions to impose punishment, the reach of the criminal law would extend into nearly every kind of conduct imaginable. For example, it would forbid any unprotected sexual intercourse by any person who might pass on any genetic defect to possible offspring. Under the harm principle, this conduct therefore falls into the contested category, because in relation to the immediate parties it does not necessarily risk any harm at all, and in relation to any indirect genetic risk to third parties the harm is uncertain, remote, and threatens no actual person in being.

In cases where there is full consent, this conduct does not satisfy the equal respect principle. This is because there is no failure by either party to respect the equal value and the equally shared interests of the other. Furthermore, (and by contrast with the case of abortion) such conduct could not be classified as treatment of or conduct towards the possible others who may be brought into existence as an eventual consequence of the conduct. So, because there are grounds to doubt whether this conduct necessarily satisfies the harm principle and because it clearly does not satisfy the respect principle I conclude that under the good life model, this conduct justifiably falls into the contested category and should not be criminalised.

⁸⁶ See von Hirsch A, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in Simester AP & Smith ATH (eds), *Harm and Culpability*, (Clarendon Press, Oxford, 1996) 259. See also Feinberg J, *Harmless Wrongdoing*, (Oxford University Press, 1988) at 166.

Consensual slavery

This issue was raised by John Stuart Mill, who argued in *On Liberty* that no person should be allowed to give up their entitlement to freedom and sell or give themselves into slavery.⁸⁷ Mill's conclusions have been doubted by Kent Greenawalt, for example, who has suggested that submitting oneself as a slave to another need not necessarily be at odds with a person's dignity, autonomy or welfare.⁸⁸ Normally this kind of conduct would be dealt with through the law of contract and in any society that adheres to the principle that each human being must be treated as a person of equal dignity, worth and value, such a contract would be an utter nullity. However, Greenawalt's argument does raise the issue as to whether a community can justly criminalise one person's conduct in purporting to own another person or in treating another person as a slave. The real difficulty in this case arises from the fact that the concept of a 'consensual slave' is itself a logical contradiction,⁸⁹ and so the forbidden conduct would have to be described as 'pretending to own a slave'. A real slave is someone who bound to absolute obedience, is without freedom or rights and is the chattel of another who is entitled to dispose of their body and life as they choose.⁹⁰ Clearly, any acts of physical or bodily interference that the 'slave-owner' might carry out under such a pretence would fall to be considered under the ordinary crimes of murder, manslaughter, wounding, etc, and this conduct would raise the issue of consent, which I discuss below. This leaves the pure offence of 'pretending to own a slave'. Presuming that the 'slave' remained willing throughout the episode, there

⁸⁷ Mill JS, *On Liberty and Other Essays*, (Oxford University Press, 1998) at 113-115. See Dan-Cohen M, 'Basic Values and the Criminal's State of Mind' (2000) 88 *California Law Review* 759, discussing Mill and Hare RM, 'What is Wrong with Slavery?' (1979) 8 *Philosophy and Public Affairs* 103. See also: Feinberg *Harm to Self*, (Oxford University Press, 1986) at 71-87 (discussing Mill); Greenawalt K, 'Dignity and Victimhood' (2000) 88 *Californian Law Review* 779 (commenting on Dan-Cohen); and Fuchs AE, 'Autonomy, Slavery and Mill's Critique of Paternalism' (2001) 4 *Ethical Theory and Moral Practice* 231 (also discussing Mill).

⁸⁸ Greenawalt, 'Dignity and Victimhood' above footnote 87 at 787-788, discussing Dan-Cohen's views in 'Basic Values and the Criminal's State of Mind' above footnote 87 at 768-770.

⁸⁹ Any person who agrees to be a slave does not actually become a slave because a person's status as a free person flows only from community action, not from individual action. This means that the conduct of the slave can be described only as 'pretending to be a slave' and the conduct of the owner in purporting to have a slave can be described only as 'pretending to be a slave owner'.

⁹⁰ *SOED* at 2893.

would be no threat to the slave's autonomy and no consequent harm on the grounds of setting back the slave's autonomy interests. If, however, we accept the suggestion that any conduct of one person in pretending to own another person would in fact threaten the psychological wellbeing of the one who is pretending to be the slave, then this conduct would satisfy the harm principle.

There would be no real difficulty in satisfying the 'equal respect' principle in these cases because the 'owners' have, by their conduct in purporting to own another person, failed in a fundamental way to treat the 'slaves' as persons of equal dignity, worth and value. These conclusions suggest that the state, which exists (amongst other things) to preserve the community as a place where each person treats others as equals, would be justified in responding to any such conduct under the good life model by criminalising it.⁹¹ It must be stressed, however, that this situation, as a logical inconsistency, does present an unreal problem. The real issue raised by consensual slavery is the issue of consent, and this is a problem that is also directly and more realistically raised by the next group of contested crimes.

Voluntary euthanasia; actively assisting suicide (as opposed to providing the materials requested by a would-be suicide); consented-to maiming, wounding or assault; consensual prize fighting, boxing and gladiatorial contests.

These cases all raise the same issue: are we justified in criminalising conduct in cases where one person inflicts bodily harm or bodily force on another person with their consent? The answer that the good life model gives in all of these examples, which range in seriousness from active killing to the infliction of a painful bodily stimulus, is that a legislative decision to criminalise the conduct would be justified – with the exception of conduct that imposes only pain on another. I would except the imposition of pain falling short of causing any actual bodily injury on the grounds that one person's experience of such a nervous stimulus as a pleasurable as opposed to a painful sensation is a matter of personal perception and interpretation. If, on the other hand, it is accepted that even a welcomed 'pain' is a harm as objectively assessed,

⁹¹ We would not be justified in using the criminal law to punish those who submit themselves as slaves to others on the grounds that: the so-called 'slaves' have not engaged in any conduct that can be seen as 'treatment of another'; it is doubtful that the submission to the will of another is always and necessarily harmful to others (as opposed to being harmful to the slaves themselves); and, while it is true that those who submit themselves to others as slaves have valued themselves as carrying less than their true worth, they have not acted with any disrespect to any other person.

then I would suggest that such harms would fall under the *de minimis* principle⁹² and for that reason we should choose not to criminalise such conduct. The point is that while some conduct may technically satisfy the harm to others principle, this fact (provided it also satisfies the respect principle) merely provides the state with morally acceptable reasons for criminalising it; it does not of itself mandate criminalisation.

In each of the remaining cases, I would argue that the harm to others criterion is easily met. In every case significant harm or setbacks to the victim's welfare interests would be sustained as a direct result of the conduct. By contrast, Joel Feinberg, who includes a criterion of wrongfulness within his extended definition of harm and who classifies autonomy as a trumping value,⁹³ has argued that any setback to an interest to which the victim consents cannot properly be classified as a 'harm'. Consequently, he is forced to forbid events such as gladiatorial contests on the grounds that they represent, not "harms" but 'free-floating non-grievance evils'.⁹⁴ However, under the good life model, a risk *either to welfare or to autonomy* is enough to satisfy the purely factual harm principle because welfare and autonomy are independent elements of the good life. It is only if we give autonomy a trumping role over welfare that we can conclude that these effects are not 'harmful'. The good life model of a crime is premised on the fact that the state exists to protect our factual interests both in welfare and in autonomy and so, as matter of meaning and as a matter of principle, it does not privilege either aspect over the other. Neither does it require us to resolve the paradox of harm by weighing one against the other to come to any calculation of 'net harm' before we can criminalise the conduct. Rather, it accepts that welfare and autonomy are separate and incommensurable elements of the good life. Given the fact that at the

⁹² See Ashworth, *Principles of Criminal Law*, above footnote 58 at 34-35.

⁹³ Feinberg, *Harm to Others*, above footnote 72 at 35, 115-117 and 215 (on consent) and *Harm to Self* above footnote 87 at 54-55, 78 (on autonomy). See also section 9.3 of Chapter Nine.

⁹⁴ Feinberg concludes that in the case of consensual gladiatorial contests, the combatants do not attract the operation of the harm principle. He characterises these gladiatorial contests – developed by Irving Kristol – as a 'stubborn counterexample' in *Harmless Wrongdoing*, above footnote 86 at 128-133 and 328-331. Kristol's contest involves volunteer gladiators staging a commercial spectacle by fighting to the death in front of paying customers. Feinberg concludes that while these contests do no "harm" in his special sense, they may be forbidden by a liberal on the grounds that they represent a special category of 'free-floating', 'non-grievance evil': see *Harmless Wrongdoing* at 130-131 and 329-331. See also Antony Duff's discussion of Feinberg's arguments in 'Harms and Wrongs' (2001) 5 *Buffalo Criminal Law Review* 13 at 32-45.

legislative stage we are considering the conduct from an objective external observer's point of view, we can therefore conclude that all consented-to killings, maimings, woundings, etc, are clear cases of harm in the ordinary sense.

When we turn to the normative principle of equal respect, we must be able to show first, that the conduct in these cases would be seen as deviating from the norm requiring each person to respect others by treating them as equals; and, because they are crimes with specific human victims, we would also have to show that in every case the conduct would be sufficient to ground an inference that the offenders have claimed that their worth as an individual human being is greater than that of their victims. In the cases of assisted suicide, consented maiming and wounding, etc, I would argue that, considering the conduct in its abstract sense, it is relevantly disrespectful and constitutes a *prima facie* act of wrongdoing as I have defined it. The good life model is based on an objective, external, publicly assessed account of the good for human beings living together in a community.⁹⁵ This means that the equal respect principle contained within it requires us to respect the intrinsic value of others by treating the interest of any other person in life, bodily integrity, etc, as if it carries a value that is equal to our own; it does not mean that we must necessarily and always respect the wishes of others and do whatever they ask of us. In fact, the principle requires us to respect the special equally shared interests of others whether or not they give any value to that interest themselves.

The principle of equal respect requires us to ignore any individual person's self-evaluation and substitute for it the community's public valuation of the intrinsic worth of that interest. So, in order to respect another as an equal, we must sometimes reject their subjective assessment of their own value – just as we must disregard our own subjective over-assessment of our own personal worth when it does not conform with that community assessment. For these reasons I would argue that, at the legislative stage when we are considering the conduct in an abstract sense, we must conclude in

⁹⁵ See West R, 'The Other Utilitarians' in Bix B (ed), *Analyzing Law: New Essays in Legal Theory*, (Clarendon Press, Oxford, 1998) 197 at 216 criticising the modern tendency to focus on a frustrated desire account of harm because it has scuttled the notion of objective harm as a meaningful target of the law. Although the good life model it is not based on subjective desires, the subjective responses of the victim are not entirely irrelevant to sentence, as we shall see. Such subjective valuations are, however, irrelevant at the point of legislation (except in property cases, where subjective desire in the form of control over the real property and chattels is the gist of the notion of ownership).

these cases that the offenders have acted as if the equally shared interests of another are less valuable than their own, that they have therefore failed to give that interest the proper (equal) weight, and that such conduct represents a *prima facie* criminal wrong and is enough to ground an inference of specific fault.⁹⁶ In the main, our criminal laws follow this assessment and criminalise these kinds of conduct as *prima facie* wrongs, but they do, however, allow consent to function as a defence in certain cases where it can be argued that there is evidence that there is no real subjective disrespect for the value of another, for example, in the (still contested) case of the organised sport of boxing, or in the (mostly uncontested) cases of medical treatment, and so I will return to consider this issue for a second time in section 11.3, where I discuss the defences.

This account based on the good life model also explains why we do not criminalise acts of self-harm even though we do criminalise acts whereby harm is inflicted by one person upon a consenting victim. We might agree that those who harm themselves have failed to respect themselves and accord themselves a proper value, but, because self-harm is not direct treatment of another and because it is not based upon a false evaluation of *relative* worth, we are not justified in criminalising the conduct. This does not mean that any act of self-harm is therefore beyond the proper concerns of the state. But it does mean that the invocation of the criminal law is not the proper response to these cases. In fact, in a system like the criminal law that is based on a premise of equality between persons, there is no room for paternalist protection of, or more particularly, for paternalist punishment of those who would harm themselves.

Dwarf tossing contests

The 'sport' of dwarf tossing has been the subject of bans in many countries, despite the fact that some of those persons who wish to be employed as human projectiles have claimed that the bans infringe their autonomy, their dignity and their rights to pursue employment in a difficult job market.⁹⁷ The case of dwarf tossing

⁹⁶ So, for example, in the recent notorious German cannibal case (Fray P, 'Secret World of the Suburban Cannibal' *The Age*, 15 January 2004, A4) the proper response to another person's expressed desire to be killed and eaten is to refrain from acting, not to comply.

⁹⁷ This 'sport' was invented in Australia and has been the subject of public bans in Australia, the USA and Europe: see Becker L, 'Crimes Against Autonomy' (1999) 40 *William and Mary Law Review* 959 at 971; and Beyleveld D & Brownsword R, *Human Dignity in Bioethics and Biolaw*, (Oxford University Press, 2001) who discuss a French case brought to the Conseil d'État (October 27, 1995) req nos (Commune de Morsang-sur-Orge) and 143-578 (Ville d'Aix-en-Provence) at 25-27. Other

stands as a useful counter-example to the cases of consented-to maimings and the infliction of bodily harm discussed above, because the aim of the enterprise is only to throw the dwarfs through the air and not to harm them. In the light of this fact, it is possible that measures can be taken to avoid the risk of harm and this allows us to distinguish the dwarf throwing cases from the consented maimings and fighting cases discussed above, where the conduct directly and unavoidably threatens the welfare interests of the victims. So, unlike those cases, dwarf tossing may not necessarily fall foul of the harm to others criterion.

If informed consent by adult participants of full capacity has been given and full safety precautions that can eliminate the possibility of physical damage have been put into place (for example, the wearing of helmets, the use of padding, a requirement for insurance coverage, a requirement for up to date medical certificates from recognised orthopaedic specialists, and a stipulation that no person who is drunk may be allowed to participate in the throwing)⁹⁸ such conduct may not risk any harm either to autonomy or to physical welfare. Once these safety provisions are applied, the case for criminalisation under the harm to others criterion begins to disappear and the conduct begins to resemble many other risky forms of recreational self-expression and other demeaning kinds of employment that are tolerated by the community provided they are properly regulated. There might be some residual risk of physical harm in these cases and perhaps if it could be proved that this kind of conduct is necessarily a threat to the emotional or mental health of the human projectiles, these facts may be enough to warrant a finding that this conduct is covered by the harm principle.

The state is entitled and even morally obliged to regulate the conditions of such employment to ensure that it is safe for the dwarf employees, but for the reasons

groups representing dwarfs have objected to the contests on the grounds that they are demeaning and objectify little people. The French case discussed by Beyleveld & Brownsword has since been taken to the UN Human Rights Committee by one of the dwarf complainants on the grounds that the French regulations banning the organisation of dwarf throwing contests violated his rights under the International Covenant on Civil and Political Rights, but the case was not successful: *Mr Manuel Wackenheim v France* Communication No 854/1999, UN Doc CCPR/C/75/D/8541999 (13 November 1996), UN Doc A/57/40 at 179 (2002) Decision of the Human Rights Committee, 75th Session, delivered 26 September 2002.

⁹⁸ Such requirements would probably also eliminate the sport altogether by making it much less attractive as a paying proposition (these contests usually take place in bars or discotheques).

given above it is doubtful whether cases of safe, regulated dwarf throwing are a fit subject for the criminal sanction under the good life model. This is especially true if we consider that a carefully constructed regulatory system would probably be enough to deprive the promoters of any chance of making any kind of financial return, and so limit or eradicate the activity altogether. However, this case is a difficult one because comparisons with existing cases point in different directions. If we compare the 'sport' with boxing, rugby or Australian Rules football where the risk of harm cannot be eliminated because of the nature of the games, regulated dwarf tossing does not appear to be harmful enough to forbid.⁹⁹ On the other hand, because there is no equal status or reciprocity between participants as there is in boxing or football (where each participant undertakes the same risk and engages in the same conduct) the throwing of the dwarfs appears to be demeaning of the human projectiles who in these contests are equated to the status of inanimate shot-puts or javelins, who shoulder an unequal risk of harm, and who do not have an equal entitlement to toss the other participants as they themselves are tossed. By contrast, if we compare the case with ordinary recreational pursuits like sky-diving and gliding, where we allow individuals to risk their health and their welfare and (very often) death itself, we feel that we should allow the dwarfs a similar choice. If we compare the case with those where we allow men and women to perform together in peep shows for the titillation of paying customers, we may well conclude that it is unreasonably discriminatory to refuse the dwarf an opportunity to engage in what may be less demeaning employment.

By contrast with the case of regulation of employment (where paternalism is the essence of the state's role), the fact that our criminal justice system is based on the premise of equality between persons would suggest that there is no room for paternalism in these special legislative decisions and that these cases should not be criminalised. Given that we may be able to reduce the harm factor to very low levels, we must conclude that the punishment of such conduct, where it occurs, appears to create another offence based purely on the dimension of respect. Certainly, the decision of the UN Human Rights Committee which upheld the French Conseil d'État decision banning dwarf throwing contests was couched in such terms,¹⁰⁰ and the issue

⁹⁹ In boxing the aim is to deliver a knock-out blow to the head of the other boxer and the cumulative effects of such blows over time are known to lead to devastating conditions in the brain.

¹⁰⁰ See references in footnote 97 above.

of harm did not form the basis of the decision. At first glance, therefore, the decision to penalise the promotion and organisation of dwarf throwing contests, appears to provide us with more evidence that in some jurisdictions the legislators' desires to respond to the respect-based dimension of the conduct and to protect human dignity is given a greater priority of value than their desires to respond to the harm-based dimension of the conduct. However, I would argue that legislation forbidding safe, regulated dwarf tossing is impermissible under the good life model, because, just like the case of a statute requiring a dangerous rescue, it too contains a false evaluation of the relative worth of citizens.¹⁰¹

Misconduct with human corpses

Most criminal laws forbid conduct that involves mistreatment of human cadavers. These cases represent crimes of pure disrespect because they do not necessarily do any direct harm to others because in such cases it is the corpse, which is beyond harm, that is the immediate object of the conduct. The imposition of criminal sanctions can be explained on the grounds that our devotion to the principle that each human being is entitled to be treated as a person of special dignity is greater than our devotion to the harm to others principle. As John Kleinig has pointed out, our sense of the special worth of a human being and our desire to stand up for that special worth is not extinguished by the death of the person, and, because we have a sense that human beings have a history that extends beyond their immediate present and beyond their death as well, the fate of a corpse is seen as something which should be protected in the name of human dignity and worth.¹⁰² These cases highlight the importance that we place on the social meaning of the conduct and the message about the value of human beings that we read from the conduct itself, and they illustrate again the fact that our current criminal laws do sometimes allow for the criminalisation of conduct that threatens no direct harm to any of the factual interests of others.

¹⁰¹ See footnote 82 above. The false evaluation contained in such a statute would be: "Because dwarfs are not equal to persons of full stature, they must be protected from autonomously choosing, as others of full stature do, to engage in these particularly risky and/or demeaning kinds of activities and employment." Such a paternalist statute improperly treats the dwarf as a person of lesser capacity by comparison with others of full stature.

¹⁰² Kleinig J, *Valuing Life*, (Princeton University Press, 1991) at 201: 'the human corpse is not a piece of meat' rather, 'it is the residuum of some particular individual, and its fate as a corpse will be part of that individual's history.' See also Feinberg, *Harm to Others*, above footnote 72 at 83-95.

Given that our legislators do appear to make exceptions to the harm principle in order to mark out the special importance of the normative respect based dimension of the good life, these cases suggest that if we wish the two dimensional model to fit with all of our current practices we may have to modify it by allowing some respect based exceptions to be made at the point of legislation. I have argued that these exceptions are not warranted and that we should draw back from criminalising conduct that does not threaten any of the factual harm based interests of others. However, in this case I do concede that the importance of marking out the special dignity and value of the human person and our belief that not even death can erase that value, may warrant our acceptance of this case as a single exception.

Crimes of common community

Contested cases that may, if they are criminalised, fit under the category of crimes based on our common membership of the community include: bigamy; possession and use of drugs; offensive speech or acts including manufacturing pornography, possession of indecent photographs and indecent writings, prostitution, pimping, homosexual intercourse and 'unnatural' sexual practices; begging and loitering; blasphemy; and the breach of seatbelt and helmet laws. I discuss these crimes under this category because many of them (for example, those that criminalise certain sexual behaviours) cannot qualify under the first category. This is because they do not threaten any of the interests of others that we share simply by virtue of our common nature as human beings, and, given that they do not have specific individual victims, they would, if criminalised, exhibit only a diffuse and not a specific fault element.

The difficulty with most of these cases arises from the fact that they do not directly threaten any of the interests that we share either as human beings or as members of the community. Rather, those who wish to criminalise them rely for their justification on the fact that they are offensive to others in a moral sense, and as I pointed out in section 9.4, the difficulty in criminalising conduct on the basis that it causes offence lies in the fact that while we may share a *desire* not to be offended, we do not have a harm-based welfare or autonomy *interest* in not being offended. For this reason, and others, I will argue that many of these cases are not the proper subject of criminalisation.¹⁰³

¹⁰³ The literature on these issues is enormous and, given the constraints of space and my limited aim of applying the model itself to the cases, I will include only very brief references in this section.

Bigamy (and adultery)

Unlike its traditional companion of adultery, which is rarely criminalised in modern times, bigamy is still the subject of criminal penalties in Australia, Britain and the USA, despite the fact that both forms of behaviour are generally thought by most people to be morally wrongful. Under the good life model, adultery must be seen as being excluded from the criminal law and I will argue that bigamy, as such, should also be excluded as a fit subject for the criminal sanction. Adulterous conduct is ruled out as a crime because the interest affected by the conduct is not one that the individual adulterer shares with all others in the community by virtue of their shared human nature, their shared membership of the community or their shared animal nature. Rather, it is a particular kind of personal and reciprocal duty owed only between two individual persons who share the legal status of being married to one another by virtue of the definition of marriage in our community and the personal promises that the two individuals have made to one another during the ceremony of marriage. As the conduct which constitutes an act of adultery is a breach of a limited and personal duty, it is properly, therefore, not criminalised under the good life model, regardless of whether it is generally seen as wrongdoing in the ordinary sense and regardless of the harm it may threaten.¹⁰⁴

The case of bigamy is also a contested offence under the good life model, because, as Feinberg has pointed out, except where there has been a fraudulent deception of the second spouse, bigamy appears to cause no harm to others, and the interests of the deceived person may be protected more appropriately by allowing a civil remedy.¹⁰⁵ This understanding of the conduct would lead us to characterise bigamy, not as a universal criminal wrong, but as an interpersonal civil wrong rather like the tort of deception. In one sense we do not really owe the duty to avoid marrying a second spouse to all others as individual members of the community and we cannot really be said to share equally with all others in the community a *pre-legal* factual interest in all other community members being accorded the legal status of being married only to

¹⁰⁴ Furthermore, because the actual act of sexual intercourse which constitutes the breach of duty is physically directed towards the sexual partner of the married person and is not necessarily directed towards the wronged spouse, it is not the kind of 'treatment of another' that is the proper subject of the criminal law under the model. Neither is it unequivocally and in all cases harmful, for example in cases where one spouse consents to the other's adulterous conduct.

¹⁰⁵ Feinberg J, *Harm to Self*, (Oxford University Press, 1986) at 265-267.

one spouse at a time. In this respect we can contrast bigamy with all of the other crimes of common community, like treason, pollution and road safety offences, for example, where we do share a pre-legal factual interest in bodily and environmental integrity, personal security and orderly changes in government, etc. What we do actually share, on a limited and contingent basis with some – but not all – others in the community is the opportunity offered by the state to some adult persons (and some minors) to be accorded the legal status of being married to one other person of the opposite sex.¹⁰⁶ The fact that there is no identifiable interest shared equally with all others in the community and the consequent fact that the duty appears to be quite limited in scope suggests that invoking the criminal law may be inappropriate in the case of bigamy, just as it is in the case of adultery.

One of the reasons why bigamy is an interesting case lies in the fact that at first glance, the bigamist's conduct does appear to be based on a false valuation of worth. The bigamist appears to be claiming an entitlement to have more spouses than anyone else in the community. However, this value claim, while false in terms of both facts and value, does not provide the same basis for criminalisation as the claims that we have previously accepted. This is because the bigamists do not actually gain two legal spouses as a result of their conduct, since by definition the second marriage has no legal effect. At this point the case appears to resemble the legally impossible attempts, discussed above, where the punishment of the conduct appears to be based only on the accused's disrespect for the rule of law.

As Feinberg has pointed out, the effect that the bigamist actually achieves in these cases is really only the falsification of public records,¹⁰⁷ but if we focus on this interest it is impossible to construct a convincing value claim in these cases that preserves any special marriage-based objection to the bigamist's conduct: "I am worth more than anyone and everyone else in the community and so my desire to pretend to have two spouses is more important than the interest which each community member shares in the maintenance of the integrity of public records." This suggests that we may be justified in punishing the conduct only as a minor offence along with many other kinds of conduct that sabotage the integrity of public records or which induce

¹⁰⁶ In fact, our community's current conception of marriage is itself a controversial case, which is contested on the grounds of equality, and which is currently undergoing a process of redefinition.

¹⁰⁷ *Harm to Self*, above footnote 105 at 266.

public officials to act contrary to the law. This would alter the character and the perceived seriousness of the crime completely and in fact, it would not require us to punish it as the special crime of bigamy at all.

In cases where bigamy remains punishable as a separate offence by the criminal law, it does appear to be another of those cases that can be justified only as a crime of pure disrespect. However, by contrast with the case of misconduct with human corpses, which I suggested may rightly be allowed as special exception to the model's two dimensional legislative requirements, I would suggest that we should not make the exception in the case of bigamy. This is because the duty not to commit bigamy is not universally and reciprocally owed by all members of the community to all others and because it does not infringe any pre-legal interest that is shared equally by all others as community members. Rather, it appears to threaten only the more general interest that we all share in the proper maintenance of public records. As a purely private matter, it may also threaten the particular interests of the bigamists' would-be spouses in a personal and individual sense. Consequently, I would suggest that we should deal with the private aspect of bigamous conduct by allowing the would-be spouses a private remedy in tort law, and deal with the public aspect of the conduct by subsuming it into the lesser offence of swearing a false declaration.¹⁰⁸

Seatbelt and helmet laws

The punishment of those who do not wear seatbelts and motorcycle helmets is another contested case that has troubled liberals and retributivists alike, because, while failing to take proper safety precautions in the name of exercising one's own autonomy may be seen as foolish, it is not seen as morally wrong. While there may be a remote harm to those who might have to rescue a person injured in an accident and who may be upset by witnessing the extra injuries suffered because the victim failed to take the proper safety precautions, or perhaps to those who have to pay taxes to provide hospital and rehabilitation services for those who are injured, there is no direct harm to others caused by this type of conduct. Furthermore, the conduct, while

¹⁰⁸ The offence of bigamy created by s 94 of the *Marriage Act 1961* (Cth) carries a penalty of five years. However, the offence of giving defective notice to an authorised marriage celebrant is punishable by a fine of \$500 or imprisonment for 6 months, as specified by s 104. The separate and more general offence of making a false statement in a statutory declaration under s 11 of the *Statutory Declarations Act 1959* (Cth) carries a penalty of four years imprisonment.

disrespectful of the rule of law only in a general sense once the law has been passed, cannot relevantly be characterised as ‘treatment of another’ at all (let alone disrespectful treatment of another), nor can it be seen as displaying a false assessment of the relative value of others. I conclude, therefore, that this conduct is not a suitable subject of the criminal sanction under the two dimensional model and I would suggest that it might be better to characterise the matter as a grievance rather like a civil wrong that exists between the state and the unsafe driver, and deal with it by allowing the state to bring an action in its personal capacity rather than treating it as a crime to be punished by the state on behalf of the community.¹⁰⁹

The justification for allowing the state to bring such an action lies in the fact that the state has licensed the use of motor vehicles and granted access to public roads to individuals on certain conditions, one of which is that users will wear helmets and use seatbelts. Provided that the law was properly within a legitimate head of power, these conditions could legitimately be imposed in order to protect the individuals concerned from harming themselves under this kind of semi-contractual model, even though the self-harm consideration is not a legitimate basis for imposing and justifying the criminal sanction. Any failure to comply with those legitimately imposed conditions upon use of any vehicle and/or any public road would ground an action brought by the state in its personal capacity to enforce those conditions of use and a subsequent finding of liability might attract a small penalty (loss of demerit points or a small fine that goes towards road safety) that would not involve the condemnation and censure of the full criminal law.

¹⁰⁹ The need for such a category is revealed by my approach to characterising interests. The more usual approach allows that there are two separate kinds of public interests and private interests which the criminal law protects but I have attempted to construct a model that characterises all of the interests involved from the point of view of the individual only. This leaves a gap which can comfortably be filled by a personal action and which can usefully deal with those kinds of conduct that are clearly legitimate concerns of the state, but which we feel should not necessarily attract the condemnation and censure of the criminal law. Andrew Ashworth notes in *Principles of Criminal Law*, above footnote 58 at 37 that there are some jurisdictions that allow for a ‘system of civil violations, infractions, or administrative wrongs’ and I suggest that the failure to wear seatbelts and helmets is the kind of case that is appropriately dealt with under such a system. See also Ashworth A, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225 at 255.

Possession and use of drugs

These forms of conduct should not be criminalised under the good life model: the possession and use of drugs does not directly cause or threaten any harm to the equally shared interests of others, nor does it support any inference of any false assessment of the relative value of others. Drug use and possession is, if anything, treatment of the self, and because this conduct cannot be described as treatment of another, and because it is not in the relevant sense either directly harmful to others or disrespectful of the value of others, it cannot justly be criminalised. The use of certain drugs is potentially harmful and so the state is legitimately concerned with the regulation and control of such substances and may legitimately forbid the unsafe and unregulated production, storage and supply of any of these dangerous substances through the criminal law, but any punishment of individuals merely for the use or possession of these drugs appears to be neither effective as a safety measure, nor justified as a punitive measure.

Blasphemy (and the disruption of worship)

Simple blasphemy should not be a criminal offence. Because we are not worse off if others express an opinion – even an extreme and hostile opinion – on religious matters, such conduct does not satisfy the harm to others criterion. Neither does the expression of these opinions amount to an act of disrespect to any of the interests that we share equally with others in our community (unless it is intended to cause a breach of the peace). In fact, the free expression of opinion is seen as a positive good and, because we believe that it marks us out as free people, it is one of the autonomy interests that we treasure. The interest that each of us possesses in expressing ourselves allows us to contrast blasphemy, which is not necessarily or always directed towards others at all, with an act that interferes with others as they worship. Any such conduct that positively interferes with others who are merely expressing their devotion to a particular deity or practising their religion is justifiably punished by the criminal law. Obstructing those who are worshipping is relevantly harmful as a setback to autonomy, and, because our autonomy of worship is an interest which we all share equally, such conduct can also be seen as relevantly disrespectful of others.

The equal respect principle does not prevent us from expressing generally or even personally targeted disrespectful attitudes and opinions as such. As we saw above, in the discussion of consented killings and maimings, the respect principle does not

require us to respect others in the everyday sense. Rather, the equality based model contains a special conception of respectful conduct and attitudes that is limited to the requirement that each person should treat others with respect simply (and only) by treating the interests that they share equally with others as carrying a weight that is equal to their own. So, while the mere expression of opinion or devotion is neither harmful nor wrongful under the good life model, once a person's conduct changes from expression to repression (or from blasphemy to interference with others as they worship), the state is entitled to respond by criminalising the conduct.

Flag burning (and other kinds of offensive conduct)

Laws forbidding the burning of flags, often found in jurisdictions in the United States of America, create a crime that is contested for two reasons: first, because such conduct does no harm; and secondly, because it does not evidence any disrespect for any interest shared equally by others in the community. Flag burning, like blasphemy, is conduct that may be disrespectful in an ordinary sense and may cause deep offence, but it does not qualify for criminalisation under the good life model. This is because, while it may be motivated by an actual attitude of profound personal disrespect for others, such conduct is not necessarily interpreted as a failure to respect any of the equal interests of others in the community. It is only where these acts, speeches or displays (for example, deliberately inflammatory rallies driven by hate speech) are likely to lead directly and immediately to the commission of crimes of violence or to provoke a breach of the peace that they may qualify for the criminal sanction. In these cases, the fact that the conduct threatens the interest in personal safety in the public streets that flows from our equal status as members of the community, provides grounds under both the harm principle and the equal respect principle for imposing the criminal sanction.

In section 9.4 of Chapter Nine, I explained why we do not generally see ourselves as possessing a special interest in not being offended and I argued that we should not justify our decisions to criminalise conduct on the mere fact of our offended or outraged feelings.¹¹⁰ The value that we place on self expression and autonomy

¹¹⁰ I argued first that we should not seek to protect ourselves from the experience of offence because it is in one sense a necessary part of our development of our sense of identity that helps us to find out who we are and what we stand for. I also argued that offence as a test for criminal legislation would, like an unrestricted harm principle, spread the net too far and suggested that as a concept

explains our reluctance to criminalise the mere expression of offensive and disrespectful opinions – or to sanction conduct which evidences hatred and hostility towards others and which may be intended to cause deep personal hurt and offence in others,¹¹¹ unless it also causes harm to others.¹¹² We see ourselves as being made worse off, or harmed, when one of our positive interests, for example in life, health, bodily integrity, or capacity for action, etc, is set back. But in the case of offence, there appears to be no corresponding positive state, capacity or valued object that constitutes the positive interest that the experience of being offended affects for the worse. Equally important is the fact that expressive conduct is generally not the kind of conduct that is mutually incompatible. One person's expression of their own opinions does not stop anyone else from expressing their opinions. By contrast, one person's possession of a particular object is incompatible with another's possession of that object, and one person's exercise of their sexual autonomy may be incompatible with that of others. Unlike most of the other cases found in the criminal law, where one person's exercise of a particular interest may be incompatible with a similar exercise of the same interest by others, our mutual exercise of our interests in free speech or other forms of expressive display is almost always perfectly compatible.

Our reluctance to criminalise offensive expressive conduct may be explained therefore, not only by the positive value that we place on free expression and the fact

offence cannot provide us with any assistance in drawing the line between the conduct that we feel we should tolerate and the conduct that we feel we should forbid.

¹¹¹ Recently there have been moves in some jurisdictions, especially in the United States, to criminalise hate speech and other so-called 'expressive harms', see: Hanser RP, 'Punishing Hate Punishing Harm' (2000) 90 *Journal of Criminal Law & Criminology* 1047; Levy R, 'Expressive Harms and the Strands of Charter Equality' (2002) *Alberta Law Review* 393; Adler MD, 'Expressive Theories of Law: A Skeptical Overview' (2000) 148 *University of Pennsylvania Law Review* 1363; Anderson ES & Pildes RH, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503. An expressive harm is said to arise 'from inappropriate valuations of people expressed in state (or individual) action' even where 'material or otherwise tangible burdens are absent' (Levy R, 'Expressive Harms' at 394, citing Anderson & Pildes), however, under my account of harm, this kind of false valuation does not result in harm in the ordinary sense because it does not necessarily render any person worse off. Any aspect of false valuation would be relevant to the issue of wrongfulness and fault.

¹¹² For a defence of the view that offensive conduct should also satisfy the harm to others principle, see Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269.

that we do not normally consider offensive conduct to be harmful; it may also be the result of a deeper awareness of the fact that while our common interests in pursuing our welfare and our autonomy are often incompatible, there is no such incompatibility between one person's exercise of their autonomy of expression or thought and the same exercise of that interest by anyone else.¹¹³ If expressive, but offensive, conduct does not take away anything that others may have or prevent anything that others may do, then it is neither harmful, nor relevantly disrespectful of others, and so it should not be criminalised as a wrong to others.

Some forms of expressive conduct may, in some places, be so offensive to others that the state is justified in criminalising them. As Simester & von Hirsch have pointed out, purely offensive conduct can satisfy the 'harm to others' criterion in cases where the prospect of being forced to witness publicly such conduct as defecation, indecent exposure, masturbation, copulation, nakedness, etc, is so offensive to ordinary members of the public that they would universally feel unable to go to public places if that kind conduct was likely to be taking place there.¹¹⁴ Such conduct may cause actual psychological harm to children who may witness it. It may also reduce the options of others for autonomous action and so any conduct that threatens to give rise to these effects can therefore be classified as harmful. Public places exist for the benefit of all, and each member of the community has an equally shared interest in using and enjoying these facilities provided that their activities are compatible with the equal interest of others in the community to make use of them as

¹¹³ So, for example, my hatred of you is perfectly compatible with your hatred of me (it is only when I act on that hatred that I might harm you); and my conduct that expresses an opinion that you find offensive is entirely compatible with similar conduct by you which expresses your own equally offensive opinions. By contrast, your possession of a particular chattel is incompatible with my possession of it (theft); your conduct in exercise of your sexual autonomy may be incompatible with my own exercise of the same interest (rape, sexual assault); and your control of my physical person is incompatible with my control over my person (false imprisonment, kidnapping). Similar examples may be found in the crimes of common community, for example: one person's dangerous use of the roads is incompatible with the safe use of the roads by others; one person's enjoyment of a public park or road by committing an act of masturbation may be incompatible with the use and enjoyment of that public place by others (public indecency); and one person's desire to determine the outcome of an election is incompatible with the interest that every other voter has in participating in democratic elections (electoral fraud).

¹¹⁴ 'Rethinking the Offense Principle' above footnote 112 at 275-276, 290.

well. Because we all have an equal interest in using those public places that the state provides for all members of the community to share equally, this kind of offensive conduct occurring in public, can therefore be characterised as relevantly disrespectful, and so it qualifies as a suitable subject for the criminal sanction.¹¹⁵

Begging and loitering

For the reasons given in the discussion above, this kind of conduct should not be criminalised unless it amounts to active and significant harassment of specific individuals or becomes so threatening that others are deterred from using public spaces (for example, if organised gangs of beggars took occupation of public places.)

Sexual acts or sexual speech including: prostitution, pimping, ‘unnatural’ sexual practices, homosexual intercourse, and manufacturing pornography, possession of indecent photographs and writings.

Private homosexual sexual conduct between consenting adults of full capacity is not necessarily harmful of itself. Nor is it relevantly disrespectful of any of the special equally shared interests of others. The sexual conduct in some of these cases may be associated with remote harms like the risk of sexually transmitted diseases, but this conduct is no more risky than promiscuous sexual conduct between consenting heterosexual partners which is not criminalised. As in the previous cases of blasphemy and flag burning, the fact that others may be offended by the mere thought of particular kinds of sexual contact taking place is not enough to make it harmful. However, if sexual conduct of any kind, including both homosexual and heterosexual intercourse or prostitution were to take place in public places, it may satisfy the harm criterion, as discussed above. It seems therefore that the state may regulate prostitution, for example, as a form of employment and may control solicitation for the purposes of prostitution in the public streets as a nuisance like any other form of offensive or indecent conduct, but in all other cases it appears that these sex-based offences are not relevantly harmful to others. Provided such private conduct is fully

¹¹⁵ Simester & von Hirsch argue in ‘Rethinking the Offense Principle’ above footnote 112 at 291 that the wrong here is the failure to treat other with ‘due consideration and respect’. I agree, but I would refine that sentiment by specifying that each of us is due *equal* consideration and respect by virtue of our equal status as members of the community for whose benefit the public facilities have been provided. Of course, private nakedness, masturbation, etc is neither harmful nor disrespectful to the interests of others, and so would not qualify as suitable for criminalisation. It is the public nature of this conduct that results in it satisfying both the harm principle and the respect principle.

consensual it cannot be interpreted as a failure to respect the equal value of others and, given that it is conduct only between sexual partners, it cannot, in the absence of any public element, be seen as 'treatment of' any others in the community at all. Consequently, this conduct should not be criminalised under the good life model: it is not conduct that can be interpreted as treatment of or conduct towards others, nor is it relevantly harmful to others or relevantly disrespectful of the equal value of others.

The production and distribution of pornography is another highly contested crime and it has been argued by many feminist writers that it is both harmful to and disrespectful of women (including those women who participate in the production of this material and those women who are victims of sexual violence and who suffer as a result of the attitudes that it conveys).¹¹⁶ However, unless we can accept that the (adult) participants in the production of pornography are necessarily and in all cases harmed by their willing participation in the production of pornography, it seems that the harm caused by even highly offensive pornography must be classified as a remote harm, and that its production – as neither harmful nor disrespectful of the equally shared interests of others – is not the proper subject of criminal legislation. By contrast, in cases where the public display of the material is both generally offensive and impossible to avoid, it may be controlled for the reasons explained above.

Sanctions on producing pornography that involves the participation of children are justified as another exception based on protecting the children's special factual status of inequality that arises from their lack of capacity and their developmental immaturity. Involving children in the production of pornography threatens harm to their sexual autonomy, physical integrity, emotional, psychological and sexual well-being and is rightly criminalised. We may also justify the criminalisation of the supply and possession of child pornography which contains photographic material as forms of incitement and accessory liability. It appears, however, that the private possession (as opposed to the supply) of purely written pornography describing the sexual mistreatment of children may not be criminalised under the model, because it does not threaten any direct harm to any person, it is not treatment of any other person, and its mere production has not involved the mistreatment of any actual child.

¹¹⁶ The literature debating the topic of pornography is massive and constraints of space prevent me from exploring it in any detail. Joel Feinberg gives a useful summary of the arguments in *Offense to Others*, (Oxford University Press, 1985) at 127-164 and 165-189.

Bestiality

The final contested crime, bestiality, is one that I have included under the category of those crimes based on our common animal nature. Assessing human conduct towards animals is difficult because (just as in the case of abortion) we are not comparing like with like. In one sense we share an equal status with all other animals purely as animals and to some this suggests that we should neither hurt nor kill any animal unless it is in self defence. On the other hand, while we see ourselves as animals, we also see ourselves as being in a special category of animals and in that sense we classify ourselves as significantly different from all others. This makes it difficult when we try to apply the equal respect principle, because even in those communities where we do currently acknowledge that all animals share an equal interest in welfare, we do not currently regard their individual interests in life and autonomy as carrying the same weight as ours. Consequently, it is not an offence to kill an animal humanely, but it is an offence to torture it or treat it in ways that will adversely affect its experiential and sensory wellbeing. The case of sexual misconduct with animals falls into a special category, because while many within our community regard it with horror, such conduct is not always necessarily and unequivocally harmful to the animal. This suggests that, provided it does not harm the animals, sexual conduct with an animal if conducted in private is not properly criminalised. In cases where it does harm the animal's physical wellbeing or where it is offensively carried out in public places, it is suitably punished by the criminal law.

Conclusion to the discussion of the contested cases

The discussion of these contested cases suggests that, under the good life model, most cases of conventionally offensive conduct or private consensual sexual conduct between adults should not be criminalised unless the conduct has a public element that can support the conclusion that the conduct both threatens harm to others and represents a failure to respect the special interests that we share with others either as human beings or as members of a particular community. It is this public element that transforms the conduct from merely offensive conduct (that is beyond the reach of the two legislative principles) into harmful and disrespectful conduct that can justifiably be forbidden under the criminal law. The model also explains the relevance of conventional morality within our legislative process and accounts for – and limits – its place as part of the basis upon which the state might protect our shared interests in using and enjoying public places which it provides to all within the community.

My equality based model projects our community's two dimensional vision of the good life into every crime by using the two principles of 'harm to others' and 'equal respect for others' to set the factual and the moral limits of the criminal law. I have shown that with one exception we can use these two principles to explain and justify our legislative decisions without the need to supplement the model with any other tests or categories.¹¹⁷ The only exception occurs in the unique case of misconduct with human corpses, where the person whose body is the object of the conduct is beyond harm, but where the special nature of their remains as a human body imposes a residual duty of respect. The model's separation of the normative from the factual gives a better structure to our debates, and this allows us to identify more clearly the sources of our difficulty in cases where we must compare beings that we do not see as sharing an equal status (eg, in cases of abortion or crimes involving animals) and to see the role played by choice and cultural variation in our legislative decisions.

The harm principle and the equal respect principle, when combined together, rule out the punishment of a range of crimes that liberals have consistently opposed, including: thought crimes, victimless crimes, crimes of purely expressive or offensive conduct, and conduct that is disapproved of merely because it represents a deviation from conventionally accepted sexual mores. These principles also prevent the state from passing any law that imposes any form of paternalist punishment of self-harm (on the grounds that such conduct is not based on a false assessment of relative worth) or any law that appears to value one person's worth as either greater than or less than the worth of others. This discussion of the contested cases has shown not only that the good life model offers us a principled and relatively straightforward way to resolve our current doubts about the content of the criminal law, but also that it can deliver upon the liberal promise in a way that the harm principle – either in its earlier incarnation put forward by John Stuart Mill or in its later extended formulation suggested by Joel Feinberg – cannot do on its own. It also suggests that liberals seeking to limit the scope of the criminal law might be better advised to focus a little less on the notion of liberty and a little more on the powerful concept of equality.

¹¹⁷ In this respect the good life model compares favourably with Feinberg's taxonomy, which allows autonomy to trump the extended normative harm principle, and which supplements it with a limited 'offence principle' as well as other categories of theological evils, legislative evils, including grievance evils, non-grievance evils, welfare connected evils and free-floating evils. See my discussion in section 7.4 in Chapter Seven and section 8.3 in Chapter Eight.

I have argued in this section that the principles contained in the good life model of a crime are sufficient on their own to provide us with a morally and politically acceptable source of limits on the legislative decision. In the following sections I will test the model's ability to account for the limits that we have placed upon the decisions that we take at the trial and sentencing stages of the criminal process. Then, before turning once more to look within the criminal law, I will complete the chapter by seeing whether the insights into the apparent purpose of the criminal law and its proper legislative boundaries produced by the good life model can cast any light upon the reasons why in modern times we have maintained such a firm division between the criminal law and the civil law and why these two paradigms are marked out by two distinctive conceptions of justice and two different responses to harm.

11.3 Evaluating the defences and the limits on our decision to convict

I have argued that our criminal law can best be explained as an expression of our vision of ourselves as political and moral equals who share a basic entitlement to pursue and enjoy the good life together as members of a community of equals. This vision of the good life has two distinct dimensions, both of which are reflected into our criminal law, and in this section I want to see whether an analysis of the defences, which are themselves another source of limits upon the state's entitlement to punish offenders for their criminal conduct, can sustain my hypothesis that the choices that we have made when constructing our laws reveal that we value the normative dimension of the good life more highly than its factual harm based dimension.

My aim in presenting an interpretation of the defences that is based on the priority of the normative over the factual is two-fold: I hope to demonstrate once more the two dimensional model's usefulness in explaining and justifying the broad structures of our criminal justice practices; and I also want to show that, in the main, these practices present a principled and coherent approach to defining and limiting our responses to the wrongful conduct of others and the harm which that conduct might cause. In the interest of brevity, this discussion is limited to showing how the respect based account of the defences (in their most basic, and admittedly over-generalised, form) might apply in practice. As the discussion will show, almost all of the defences can be explained as the result of our desire to ensure that, regardless of the harm that a person may have caused, we will convict and punish only those persons who have actually failed in their attitudes and their conduct to respect others as equals.

As I explained in Chapter Ten, our criminal law can be seen as containing a special conception of wrongdoing as conduct that deviates from the primary norm requiring each individual to respect others and treat them as persons of equal value. Under the good life model, a finding of criminal wrongdoing is based on the fact that the conduct has threatened harm to one of the special interests that we share equally with others, and a *prima facie* inference of fault is raised whenever a person has failed to recognise and respond properly to the equal value of others. This assessment of fault is based on the offenders' false evaluation of their own relative worth, and it can be evidenced in two ways. It can be found in the expressed attitudes towards others that accompany the offenders' conduct, or it can be inferred directly from the fact that their conduct has threatened harm to one of the interests that they share equally with others. However, a *prima facie* inference of fault based on the fact that a person's conduct has harmed another can be rebutted by showing that, despite appearances, it was not actually animated by a false assessment of relative worth.

In cases of automatism or purely accidental conduct, for example, where a person's actions are involuntary, we do not interpret their conduct as displaying the requisite failure of respect. So, in the classic case where a spider startles a driver who loses control of his car and causes the death of a pedestrian, we do not charge him with any criminal offence. This is because the driver's involuntary conduct, while clearly harmful, is not seen as being animated by any failure to respect the pedestrian as an equal. However, in cases where harm may result from gross negligence, there may be enough evidence to support an inference that the agent of harm has not respected the interests of others. An example might be a case where a delivery driver, desperate to finish his week's work early, knowingly takes an overloaded truck with faulty brakes into a busy multi-lane highway on a dark, wet night and causes a fatal accident. In this case we would presume fault because the driver had rated his own interests as being more important than the interests of others in safety on the roads. The fault in this case is the fault of not considering the interests of others before acting dangerously.

I want to suggest in the following discussion of the defences, that in cases where the agent of harm has in fact treated the interests of the other person as carrying a value that is equal to their own, we do not convict and we do not punish, regardless of the harm that may have been caused or intended. The defences that I will discuss are:

- mistake of fact
- insanity and intoxication producing a mental impairment

- immature age;
- ignorance or mistake of law (and entrapment);
- necessity, duress;
- self defence, defence of another, and provocation (a partial defence);
- combatants in armed conflicts;
- lawful chastisement of children; and
- consent.

A clear example that illustrates the priority that we give to the dimension of respect can be found in the defence of mistaken belief in the fact of consent that is allowed in cases of rape or sexual assault.¹¹⁸ In these cases, where there is evidence that the accused honestly and reasonably believed that the complainant was consenting to sexual contact, the accused's state of mind cannot support the inference that he had treated another individual's interest in sexual autonomy and physical integrity as being worth less than his own. We do not convict because such evidence shows that, by engaging in what he thought was a mutually agreeable sexual encounter, the accused had in fact respected the other person as an equal. However, despite our finding that the accused was not at fault in this scenario, it still remains true that the woman has had her sexual autonomy invaded and her physical integrity violated as a result of the accused's conduct in having sexual contact with her without her consent. No matter how we choose to characterise the event, the woman will suffer the same harm,¹¹⁹ but the fact that we allow the defence shows that the criminal law is not primarily concerned with responding to the fact of harm-doing – or even to the fact of a rights violation – but with responding directly and only to people who have exhibited this special kind of fault that represents a failure of respect.¹²⁰

In cases of insanity and extreme intoxication producing a mental impairment, where the accused is deprived of the ability to understand the meaning of their actions, or is incapable of preventing themselves from acting, these facts would rebut the presumption that they had acted without respect for the equal value of others.

¹¹⁸ In common law jurisdictions this claim functions as a denial of the mental element, and, provided the belief is honest, it need not be based on reasonable grounds. However, in other jurisdictions, where the claim constitutes a separate defence, the belief must be both honest and reasonable.

¹¹⁹ In fact, she may suffer even more harm as a result of our refusal to convict and punish the accused.

¹²⁰ In order to affirm the wrong done to the victim in such cases, George Fletcher has suggested in *With Justice for Some*, (Addison-Wesley, New York, 1996) at 180-188 that we should allow for a two part verdict that specifies first, whether or not the victim's rights were violated, and secondly, whether or not the accused should be held to be criminally responsible for that rights violation.

However, in cases where the accused was merely intoxicated but nevertheless was able to understand and control their actions, the presumption of fault arising from the conduct under the good life analysis would not be rebutted because even an intoxicated act of disrespect is nevertheless an act of disrespect. A similar result would apply in cases of young children who have not reached a sufficient stage of maturity to be able to recognise the equal value of others or to be able to control their responses to others. In each of these cases, the result yielded by the respect based analysis of the defences is the same as that currently found in most jurisdictions.

The defence of ignorance or mistake of law is not generally accepted as a defence, although it is sometimes accepted as a mitigating factor in sentencing.¹²¹ Under the good life model these defences should not be accepted to a charge relating to a crime of common humanity, because the everyday norm of conduct requiring each person to respect others and to treat them as equals is sufficient to provide every person with a simple guide to conduct that will avoid offending.¹²² Things are different, however, in some crimes of common community or regulatory offences where particular laws may not always be matters of public knowledge. In cases where the offence is sufficiently unusual or unheard of, and where the accused could not reasonably be expected to have known or to have inquired into the existence of the rule, the good life model would differ from the usual rule and allow a defence on the grounds that the conduct in question was not accompanied by any false assessment of relative worth.

A similar result should apply in cases where citizens have inquired and reasonably relied upon official advice that a proposed course of conduct is lawful.¹²³ By contrast,

¹²¹ See: Alexander, 'The Philosophy of Criminal Law' above footnote 58 at 831; Ashworth A, *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 237-242; Fox RG & Freiberg A, *Sentencing: State and Federal Law in Victoria*, 2nd ed, (Oxford University Press, Melbourne, 1999) at 250; and Wasik M, *Emmins on Sentencing*, 4th ed, (Blackstone Press, London, 2001) at 61.

¹²² Blackstone's comment in his *Commentaries on the Laws of England, Volume IV, Of Public Wrongs*, (University of Chicago Press, 1979) at 27, that every man 'is bound to know the law and presumed so to do' makes sense in the context of the crimes of common humanity, but in modern times it may be an unreasonable presumption in all cases of crimes of common community.

¹²³ See, for example, *Universal Salvage v Boothby* (1983) 5 Cr App R (S) 428 cited by Wasik, *Emmins on Sentencing*, above footnote 121 at 61-62: the fact of reliance upon official advice was a mitigating factor in sentencing. See also Ashworth A, 'Testing Fidelity to Legal Values: Official Involvement and Legal Justice' in Shute S & Simester AP (eds), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, 2002) 299 at 303, discussing *Posternobile plc v*

cases of state entrapment¹²⁴ would not necessarily qualify under the good life model's respect based analysis of the defences (although a stay of proceedings or mitigation of penalty may well apply in these circumstances.) If the police action had only provided an opportunity for the offence to take place, the conduct would nevertheless qualify as an act of faulty wrongdoing because the accused in such circumstances has in fact acted without respect for the interests of others. However, in cases of active incitement, a separate principle of justice would apply to justify a stay of proceedings,¹²⁵ and I would suggest that in other cases, where the state officials' conduct was not enough to fully justify a stay of proceedings, a proportionate mitigation of penalty should apply.

The defences of insanity, intoxication, immature age, mistake of fact and (in some cases) mistake of law, are properly allowed under the good life model, because, where these facts relating to the accused's state of knowledge, intention or capacity can be proved, they prevent us from interpreting the accused's harmful conduct as a conscious act of disrespect. In many of these cases, an accused may have caused great harm, but, because their acts are not interpreted as being based on a false evaluation of relative worth, we do not convict. The remaining defences of necessity, duress, self defence, etc are even more instructive, because in these cases, it is often true that the accused has consciously intended to invade a particular interest and to cause some particular harm to another, yet we nevertheless refuse to convict, even in these clear and admitted cases of intended harm, because, in all the surrounding circumstances,

Brent London Borough Council, The Times, 8 December, 1997, where the Divisional Court stayed proceedings in a similar case. See also *Ostrowski v Palmer* [2004] HCA 30 (16 June 2004).

¹²⁴ See Ashworth, *Principles of Criminal Law*, above footnote 121 at 243-244; 'Re-Drawing the Boundaries of Entrapment' [2002] *Criminal Law Review* 161; and 'Testing Fidelity to Legal Values' footnote 123. But see Gardner J, 'Book Review: *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press, 2002) Shute S & Simester AP (eds)' (2003) 119 *Law Quarterly Review* 161 at 164, who argues, contrary to Ashworth, that no benefit should be allowed to 'non-officials' who rely on official advice in these circumstances on rule of law grounds.

¹²⁵ In my view, which I discuss in Chapter Twelve, it is a basic principle of justice that where the state is itself to blame for the occurrence of a crime, either completely or in part, then it should be precluded to that extent from punishing an offender for the offence: Davis J, 'Fault or Forgiveness: The Politics of Punishment in Shakespeare's *Measure for Measure*' paper presented to the *Second International Conference on Sentencing and Society*, at the Centre for Sentencing Research, Law School, Strathclyde University, Glasgow, Scotland, UK, 27-29 June 2002.

we do not interpret the attacks as being characterised by a failure to treat the other party as an equal.

The defences of necessity and duress can both be accommodated under the respect based account of the defences. Where an accused has acted under immediate duress of circumstances or fear of threats, it can be argued that their conduct does not unequivocally reflect an attitude of disrespect. Because such conduct primarily reflects an attitude of utter desperation, which may well be compatible with a belief in the equal value of the other person, we do not necessarily convict. However, we restrict the defence to cases where no reasonable alternative exists, because it is only in these circumstances that any doubt as to the accused's attitudes can be supported.

Cases of self defence and defence of another can also be interpreted as examples of the operation of the equal respect principle. In these cases, the presumption of disrespect that arises from an accused's conduct in intentionally applying force to the person of an attacker is rebutted, because in the temporary circumstances of emergency that were created by the attacker's own conduct, the accused has not failed to respect the attacker as an equal. In fact, provided the attacker's conduct has itself demonstrated a failure to respect the accused's equal entitlement to life or bodily integrity, and provided that there were no other reasonable means of escape from the peril, the accused's conduct in adopting the attacker's (lower) standard of respect and fighting back *at the same level* already set in place by the attacker, can actually be seen as treating the attacker as an equal.

Once the 'social contract' has been broken and the attacker has temporarily set in place a new and lower standard of conduct, the victim of the attack may, while the danger lasts, treat the attacker as an equal, adopt that standard for the duration of the emergency, and respond in equal measure. The requirement that the accused must have used only reasonable force is also easily explained by the respect based account of the defence, because it would allow a person under threat to respond only at the new level set by the attacker's conduct. So, if the conduct threatens only the possessory interests of another, it would not be acceptable to respond with conduct that threatens serious injury or death. Furthermore, the response can last only while the extraordinary circumstances prevail, so once the attack ceases or the danger is over, the higher standard applies again, and the response in self defence must cease.

In cases of self defence, the facts clearly reveal an intentional act of harm-doing, but there is no conviction because of the trumping effect given to other facts showing

that the accused has not actually failed, in the circumstances created by the attacker, to treat the attacker as an equal. Analogous arguments may be advanced in some cases of provocation, which is allowed as a partial or qualified defence to murder in some jurisdictions.¹²⁶ If a victim had consciously engaged in conduct that was deliberately directed at the accused and was calculated (or objectively likely) to drive the accused to violence, such conduct could also be seen as creating a lower standard of respectful conduct between the two parties, which, provided it did deprive the accused of their powers of self-control, and provided that there were no reasonable means of escape, could entitle the accused to treat the provoker as an equal and respond at that lower level of respect. The difference between provocation of this kind and the straight out physical attacks found in cases of self defence lies in the provoker's use of words rather than physical blows, and this difference may account for the fact that where provocation is accepted, it does not provide a complete defence and its scope is subject to strict limits.

Under the good life model, the partial defence of provocation could apply only to conduct like a vicious and extended verbal attack directed specifically towards provoking the accused, or to the kind of constant bullying, abuse and intimidation found in cases of family abuse or relationship dysfunction seen in cases of battered wives. It would not provide any mitigation where a man kills his wife because she has engaged in flirtatious or adulterous conduct; partly because this kind of 'provoking' conduct is not directed toward the husband himself, but also because the 'equal treatment in response' criterion mandated by the respect based account would entitle the husband to respond only by committing adultery himself, and would rule out any attack on the physical wellbeing of his wife. The interpretation of provocation based on the good life model may, therefore, allow the matter of provocation to remain as a relevant consideration (either as a partial defence or as a mitigating factor in sentencing),¹²⁷ and would have the advantage of ruling out many of the most troublesome cases of revenge killings or the punishment of spouses for adultery.

¹²⁶ See Ashworth, *Principles of Criminal Law*, above footnote 121 at 231. In my own jurisdiction of Tasmania, provocation has been abolished as partial defence: Bradfield R, 'The Demise of Provocation in Tasmania' (2003) 27 *Criminal Law Journal* 322.

¹²⁷ As Graeme Coss's review of recent discussions by law reform bodies in 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133 reveals, there is a split in attitudes towards provocation; some academics support complete abolition, whereas others suggest that the

The defence to a charge of murder or wounding, etc, allowed to combatants during armed conflicts is another example of the equal respect principle at work. In these extreme circumstances of emergency, the intentional infliction of death or physical harm upon an enemy soldier is not seen as a failure to respect the enemy as a person of equal value. In fact, each combatant shares and acknowledges an equal and reciprocal interest in killing or harming the enemy during the course of the conflict, which arises from their equally shared factual status as combatants, and which is seen as entitling combatants on either side to try to kill or disable those on the other side whether they are acting in self defence or not. However, this exception arises only under limited conditions, and if a combatant were to go beyond the accepted rules of war and to act without respecting the status of the enemy as an equal – for example, by torturing an enemy soldier to death – the defence would not apply.

Lawful chastisement of children is a defence which has recently been questioned by those who deny the rights of parents to impose physical punishment upon their children.¹²⁸ Under the good life model, chastisement should not operate as a defence. A child's interest in bodily integrity is equal to that of all others, and no equality based exception similar to those discussed in section 10.3 of Chapter Ten that protect the child's special vulnerability (eg, to sexual abuse) can justify the intentional application of any physical punishment to children or any application of force beyond minor everyday physical contact. Arguably, therefore, a parent would be entitled to physically push or pull a child's hand away from a hot stove, or to pull or drag to safety a child intent on running onto a road, but would not be entitled to inflict physical punishment upon a child as a means of discipline or chastisement.

These reforms (just like reform to laws about abortion, animal rights, etc) are controversial and this fact points up the role played by our cultural attitudes in these decisions. Where practices like the punishment of children, the routine circumcision of baby boys,¹²⁹ or the sterilisation of mentally disabled girls and women,¹³⁰ for

partial defence be retained provided statutory limits are imposed upon it. My preference would be to abolish provocation as a partial defence and deal with the matter at the sentencing stage.

¹²⁸ Tasmanian Law Reform Institute, *Physical Punishment of Children: Final Report No 4*, (Tasmanian Law Reform Institute, Hobart, 2003) at 21-29 surveys international developments.

¹²⁹ See Boyle GJ et al, 'Circumcision of Baby Boys: Criminal Assault?' (2000) 7 *Journal of Law and Medicine* 301, arguing that we should characterise the routine medically un-needed circumcision of baby boys as criminal assaults.

example, have a long history within a society, it can take some time before the community realises that the protection generally offered to the paradigm legal person (the free adult male citizen of full capacity) ought, as a matter of justice, to be offered to all who share the same factual identity, regardless of their cultural status as 'different', 'other' or 'abnormal'. The advantage of the good life model is that at the outset it forces us to consider the factual categories of equality that we share, whereas other approaches, for example, those based on reflecting conventional morality, can allow us to adopt an uncritical and inconsistent approach to the criminal law. The equality based good life model makes it clear that special exceptions are justified only if they equalise the position of children and aim to protect them from their special vulnerability. Such exceptions should not be allowed if they ignore that vulnerability, or worse, deliberately leave it unprotected. In the case of the punishment of children, this account reveals that the traditional exception should not be allowed, because it denies the equal interest that children have in physical integrity. It may be argued that a punishing parent's intention to hurt the child is not unequivocally disrespectful because it is primarily aimed at correcting the child, however, this interpretation of physical punishment could apply only if there were no other means available to the parent to correct their children's behaviour and to instil a sense of discipline in them.

The final defence of consent is another area where an uncritical acceptance of conventional practices can lead us into difficulty. This is particularly true in the cases of medical treatment, end of life decisions, sexual conduct and sporting contests.¹³¹ In the case of medical treatment, we often allow the consent given by a competent adult to afford a defence to a charge of battery, wounding or serious /grievous bodily harm. In the case of end of life decisions we generally disallow the defence of consent, although the doctrine of double effect does complicate the analysis. In some circumstances, we accept consent as a defence to a charge of assault and battery but not to any more serious offence, and in cases of boxing and sado-masochistic conduct we apply exceptions to the defence of consent in an inconsistent fashion. As commentators like Lacey and Ashworth have noted, the main source of difficulty in this area arises from our attempts to rank the relative importance of the two

¹³⁰ See the Australian case of *Secretary, Department of Health and Community Services (NT) v JWB & SMB (Marion's Case)* (1992) 175 CLR 218.

¹³¹ Ashworth, *Principles of Criminal Law*, above footnote 121 at 323-329.

incommensurable factual, harm-based elements of the good life, namely, our welfare and our autonomy, however, as we shall see, the good life model does offer us a way to deal with this problem of incommensurability and to develop a consistent approach to most of the consent cases. The model's account of the relation between the factual and the normative elements of the good life also helps us to understand the way that this defence works and the analysis that follows suggests that some minor changes to the structure and application of these defences should be made.

Medical treatment presents as a difficulty, not simply because the interferences with bodily integrity involved in modern medical practice may include operations that carry grave risks to life, but because some treatment, like sexual reassignment surgery, for example, may involve serious physical mutilations and permanent loss of function. In these latter cases, the conflict between the dictates of autonomy and welfare require us to make judgements that are not always clear and uncontested. There does not appear to be any real difficulty in allowing consent as a defence in cases where a patient is suffering an illness or medical condition that threatens their physical wellbeing and where the treatment is designed to improve that condition. In such a case, where medical opinion supports the intervention and where the patient requests intervention, the doctor's conduct is not interpreted as an act of disrespect. In ordinary circumstances, both elements are necessary and the existence of consent on its own would not support the defence. It is only when the aim of the doctor to improve the patient's physical condition is combined with the patient's desire for that treatment, that we can unequivocally interpret the doctor's interference with the patient's body as constituting an act of complete respect – because it is only in these circumstances that both the patient's incommensurable welfare and autonomy interests are secured. If an operation is contrary to the patient's best interests, therefore, an apparent consent should not afford a defence and a conviction for wounding or serious/grievous bodily harm should follow (just as it would follow if an operation was in the patient's best interests but the patient did not consent). So, for example, if an operation was contrary to the patient's best interests and the doctor, knowing this, carried it out only in order to try a new experimental surgical technique, the doctor's conduct would not be interpreted as an act of equal respect because she had not treated the patient's interest in physical integrity as carrying a value that was equal to her own. The value claim in such a case would show the extent of the

disrespect: "My desire to practice my surgical skills is worth more than your interest in physical integrity and physical welfare."

In cases where the patient refuses intervention, the good life model requires the doctor to respect the patient as an equal and to desist from treatment. If the element of consent is missing, the conduct, even if accompanied by an honest intention to improve the patient's welfare, will nevertheless be interpreted as an act of disrespect because of the importance that we give to respecting the autonomy of others. Under the good life model we must respect both of these incommensurable interests, and we must therefore resist any attempts to allow one of these factual harm based interests to trump the other. So, two requirements must be satisfied before we can accept that the *prima facie* inference of fault that arises from the doctor's conduct in interfering with the patient's bodily integrity has been rebutted. The first is to show that the doctor had respected the patient's interest in autonomy, by establishing that there was a valid consent. The second is to show that the doctor had respected the patient's welfare, by establishing that she believed that the proposed treatment was in the patient's best interests, or at very least, would not be contrary to the patient's interests ('Do no harm.')

In cases where the patient is unconscious, we deal with the conduct in a different way and allow the defence of necessity. In these circumstances (for example, in 'Amputation Rescue' Table 2.3, Chapter Two) the interference with the body of the unconscious person is not interpreted as an act of disrespect, rather, it is interpreted primarily as an act that respects the victim's equal interest in life, but which inevitably involves a harmful intervention into the victim's physical integrity. This suggests that within the category of welfare, we allow that an act which demonstrates respect for another's highest interest (namely, the patient's foundational interest in life itself) can rebut the presumption of disrespect that arises from the act of interference with any lesser interest (for example, in keeping the arm). Significantly, this act of weighing the interest in life against the interest in keeping physical function in the arm does not run into the same problems of incommensurability that we encounter when trying to weigh welfare and autonomy in the balance.

The exception made in cases of urgent necessity does not apply when the wishes of the unconscious patient are known. Even in an emergency, if the patient has refused consent and then slips into unconsciousness, the defence of necessity does not apply because the conduct privileges the doctor's desire to exercise her autonomy of action

over the patients' own desire for autonomy. In a contest between the doctor's autonomy and the patient's autonomy, the good life model requires a stand-off, and not even a benign motive will suffice to rebut the presumption of disrespect that arises from the conduct.

The good life model therefore explains how we can resolve the difficulty caused by the incommensurability between autonomy and welfare: we require both to be respected before the defence of consent can apply. This is because it is only when both aspects point in the same direction that the doctor's conduct is clearly, unequivocally and completely respectful of the equal value of the patient. When the aspect of welfare is present but there is doubt as to the aspect of autonomy (eg, where it is not known for certain that the patient does not desire the treatment) the case may be covered by the defence of necessity. Again, in this case, the conduct is clearly respectful of the victim's interests and equal value, and some weighing of the relative value of the different welfare interests is allowed. But when there is no doubt and it is known either that the patient does not desire the treatment or that the treatment is not in the patient's best interests, then no defence can apply, because in both cases the conduct expresses a false assessment of relative worth.

There are cases where the analysis is less straightforward. Recently, extreme cases of 'body dysmorphic disorders' have posed a problem that has divided doctors.¹³² These patients suffer from a disorder similar to that suffered by those desiring sexual reassignment surgery. In both cases, patients ask for treatment that would ordinarily be classified as a harmful mutilation of the body. Patients suffering from transsexual body dysmorphia wish to change their physical sexual characteristics to match their own perception of their true gender. The fact that we allow this treatment suggests that we are convinced that such surgery will improve the patients' overall welfare and where this is true, both the welfare and the autonomy criteria are satisfied. Those suffering from body dysmorphic disorders have an obsessional desire to have one or more limbs amputated in order to create a body that matches their own 'ideal' body image. In these cases, a concern for patient autonomy suggests that the surgery should be allowed, but a concern for the patient's overall welfare would suggest that surgery is not in their best interests as objectively considered.

¹³² See the BBC program 'Horizon' entitled 'Complete Obsession' on body dysmorphic disorders found on 31 May 2003 at <http://www.bbc.co.uk/science/horizon/1999/obsession_script.shtml>.

These disturbing cases of patients requesting amputations cannot easily be resolved because the value judgement made within the factual harm-based dimension itself is very difficult. One way of distinguishing between these cases may lie in following our perceptions of 'normal function' and disallowing any surgery designed only to impair normal function and allowing only surgery designed to create an apparently normal body (even though its functioning may be limited and is supported by the ingestion of artificial hormones). However, this insistence may simply be another form of discrimination (we do allow permanent sterilisation operations which are designed to prevent normal functioning) and the definitive answer to this dilemma may be beyond our grasp. Ordinarily, we would not accept that the mere desire for an amputation would be enough to justify a doctor's compliance, because we could not be sure that a person's overall welfare would be advanced by such treatment. The difficulty arises because the interests we are comparing in these cases approach incommensurability. Unlike the emergency cases, where we had to weigh the interest in the physical functioning of an arm with the interest in life itself, the task in the body dysmorphia cases requires us to weigh physical welfare against psychological welfare.

Unfortunately, some patients suffering from this obsession do eventually take their fate into their own hands by deliberately damaging their own limbs beyond repair or attempting to kill themselves.¹³³ In these extreme circumstances it may be possible for doctors to claim a special defence of necessity combined with consent.¹³⁴ Such a defence in effect claims that, just like the case of 'Amputation Rescue', the amputation is justified by the legitimate aim of saving the life of the patient, and in one sense the dysmorphia case would be even stronger than the one in 'Amputation Rescue' because the patient's consent is known for certain.

This would require proof that: the doctor honestly and reasonably believed that the patient's life was under imminent threat from the patient's own destructive desires; that no other reasonable alternative (like psychotherapy or drug treatment) existed; and that the patient was competent to give a fully informed consent (by showing that the desire was not the result of some psychotic or insane delusion). In these extreme circumstances, we might not read the doctor's conduct in acting to save the patient

¹³³ See 'Complete Obsession' footnote 132 above.

¹³⁴ A similar defence was accepted in *R v Bourne* [1939] 1 KB 687 where a doctor carried out an abortion in order to save the life of a young girl who had become pregnant as the result of a rape.

from life threatening injuries as expressing any subjective disrespect for the equal interest of the patient in life or bodily integrity. The value claim implicit in such treatment would not reveal any false assessment of relative value because it is aimed at saving the patient's life, and because it values the life of the patient as equal to the doctor's own life. Furthermore, unlike the case where a doctor wants to improve her patients' condition against their will, there is no contest between each party's autonomy or any question of self-privileging on the part of the doctor.

In order to ensure that no alternatives exist and to recognise the controversial and irreversible effects of this treatment, we should require these cases to be brought before the courts for a declaration authorising the treatment – in the same way that authorisation of the surgical sterilisation of mentally incompetent patients is currently obtained. However, these cases remain highly disturbing. In extreme cases, for example where a patient wants to have all four limbs amputated and would become a burden to others, no response beyond the refusal of surgery may be possible – or tolerable. In these cases, like the cases of very late term abortions, we may simply be unable, as a community, to bear the idea of allowing anything but an outright refusal of treatment, and in these circumstances our legislators should step in, openly state the value judgement upon which they are relying, and resolve the dilemma by passing a law that makes the duty of doctors clear.

Difficulties also arise in cases relating to end of life decisions and consent. Under the respect based account of the defences, no person may take the life of another or interfere in the bodily integrity of another unless that act is compatible with treating the interest of the other person as carrying a value that is equal to one's own. The requirement that a person must respect both the autonomy and the welfare of their 'victim' would normally rule out the defence of consent in all cases of euthanasia, mercy killing or actively aiding a suicide by the physical administration of drugs, poisons, the application of force or the use of any implements on the body of the patient. By contrast with the amputation cases, where the doctor's overriding desire to save the life of the patient prevents us from interpreting the conduct as being unequivocally disrespectful, in euthanasia cases there is no greater interest above life itself, that we can appeal to justify the deliberate ending of another person's life.

Under the good life model, which I argue provides the basic common law principles of the criminal law, a person may take their own life, but no person may take the life of another simply because they have asked to be killed. Any conduct that

is aimed at taking the life of another is almost by definition relevantly disrespectful. This is because the notion of equality mandates a stand-off if the interest under threat is one that we share equally with another.¹³⁵ If every person shares an equal interest in life, then any person who takes the life of another either with or without consent has treated that person's life as carrying a value that is less than their own. By rating their own desire to take the life as being more important than the actual life of their victim, they have privileged their desire above the value of the other person's interest. Even in cases where a person takes the life of another reluctantly, we can argue that their conduct is animated by a false assessment of relative value. So, in the case of *Maxwell*, discussed in section 10.4 of Chapter Ten,¹³⁶ where a devoted husband acted against his own beliefs when he reluctantly killed his wife, we can interpret his conduct as rating his own value as lower than that of his wife. Under the good life model, even if the dying person gives no value to their own life it remains true that it is only theirs to end, and it is not anyone else's to take.

In each of these cases the conduct is based upon a false assessment of relative value, and, under the good life principles, the law must forbid it and we must convict unless a defence or some statutory protection of the kind that has been passed in the Netherlands allowing doctor assisted suicide applies. If, as I argue, the basic principle underlying the criminal law is based upon a vision of the equal value of each person, it would lose all moral legitimacy if it were to allow any person to take or risk the life of another, because, whether there is consent or not, the conduct is based on a false assessment of relative value. The only exception to this basic proposition appears to arise in cases of war,¹³⁷ where citizens can be sent to their death in defence of their country. In this case the overriding interest of the state or community in existence appears to be valued as being more important than the interest of the individual member of that community in life. In all of the remaining cases, however, the presumption that arises from the conduct of taking or risking the life of another cannot be rebutted by evidence showing that the patient had asked to be killed.

¹³⁵ This explains why we allow ourselves to put an animal out of its misery but not another human being. Our legal system allows that an animal's highest interest is that of experiential welfare and it denies that an animal has any interest in individual existence, whereas the highest interest that a human being possesses is the foundational interest in existence – or life itself.

¹³⁶ *Maxwell* [2003] VSC 278, see text at footnote 39.

¹³⁷ Another exception, which I argue should not apply, is the death penalty.

If a person at the end of their life is in extreme distress and is competent to request death, we can accept that killing them would not invade their autonomy. However, we cannot be certain that the person's welfare would be improved by killing them. In fact the conduct, if aimed at killing the patient, is aimed at extinguishing what is left of their welfare altogether. The fact that the person herself did not value her own life or what is left of her welfare is not enough to warrant any other person taking that life. Under the good life model, therefore, the defence of consent cannot apply in these circumstances because it requires that, before we can interpret the conduct as being based upon an attitude of equal respect, it must accord both with respecting the patient's interest in autonomy and with advancing, or at very least, not damaging, the patient's welfare interests. In these circumstances, there would be no harm to autonomy, but there will (almost by definition) be some harm to whatever is left of the patient's welfare. In addition, there is the remaining harm constituted by the loss of life, which is regarded by the law as a harm in itself.¹³⁸ This analysis shows why we are technically right to convict in these circumstances, but it also reveals why we might apply a lighter penalty in these cases. When assessing the damage done to autonomy, we will find that there is no harm done; when assessing the damage to the experiential welfare of the patient, we will find that there may be only very little harm done, and all that remains to value is the harm caused by the actual loss of life itself and the degree of disrespect evidenced by the offender's conduct and expressed attitudes to the patient.

Although consent would not afford a defence, the defence of necessity might offer a partial solution. This defence would allow the administration of drugs aimed at eliminating the patient's pain or distress. Where death is imminent, and provided the patient has given informed consent, the respect based account would allow the doctor to administer any drugs necessary to relieve the pain and distress suffered by the patient. In this case, provided the dose is calculated to eliminate that pain, the doctor's conduct would be relevantly respectful of the equal value of the patient's experiential welfare. As explained above, if a patient had refused consent, the doctor must desist; but if the patient was in extreme distress and their wishes were unknown, treatment would be allowed. The defence of necessity does not allow the deliberate killing of the patient merely because they have asked for death – because ending a life cannot

¹³⁸ See my discussion of this issue in section 9.2 of Chapter Nine, text at footnotes 57-60.

save a life. But, provided the patient has given consent and is willing to run the risk, it does allow the deliberate relief of pain and suffering, even where it is known that the measures necessary to relieve that pain will hasten an imminent death. This interpretation suggests that the good life model is compatible with the doctrine of double effect, which is currently accepted in most jurisdictions in the world.¹³⁹

The account of the end of life decisions and medical treatment decisions produced by the good life model, not only matches the general shape of the law in most jurisdictions, but it also shows how that shape is consistent with a desire to ensure that where a person has respected another as an equal, we will not convict them. We should note, however, that the good life model would not forbid a person from providing another person with the items that are to be used for their own act of suicide, because such conduct does not offend either the harm principle or the respect principle. The mere provision of such items does not make the other person worse off in any way; nor does it treat any of their interests as carrying a value that is less than one's own. In this case, and by contrast with the case of euthanasia laws, the result produced by the good life account differs from that found in most jurisdictions.

The defence of consent poses difficulties in the criminal law because some people, in exercising their autonomy, wish to involve others in conduct that threatens their physical welfare. I have suggested that when these harm-based interests conflict, the defence of consent should not apply and that the criminal law, which is aimed at ensuring that both our equally shared welfare and autonomy interests are respected by others, must not resolve the conflict between welfare and autonomy by valuing one of these interests over another. In medical cases, the task is made somewhat easier because of the special nature of the doctors' duty to act in the best interests of their patients (or at least be sure that the treatment is not contrary to their interests). In non-medical cases where consent is raised as a defence, however, there is no professional duty to consider the best interests of another upon which we can rely to help to establish the absence of fault. In these cases, involving sado-masochistic practices or dangerous activities like boxing, the participants have consented to conduct with others that either risks serious bodily harm or is intended to cause pain associated with some more minor bodily harm. In many jurisdictions the general rule is that consent is allowed as a defence to a charge of assault or battery, but is ruled out as a

¹³⁹ See Otlowski M, *Voluntary Euthanasia and the Common Law*, (Clarendon Press, Oxford, 1997).

defence to charges involving any more serious crimes.¹⁴⁰ Crucially, however, exceptions are made in an inconsistent way: they are allowed in cases of boxing, where the participants aim to inflict damage beyond mere pain to the body and brain of the other boxer; but they are not allowed in cases of consensual sado-masochistic activity where one party inflicts genital and /or physical torture upon another for the sexual pleasure derived from the giving and receiving of pain.¹⁴¹

We can justify the consent defence in cases of risky sports like rugby or Australian Rules football. In these sports, rough physical contact is part of the game but any conduct animated by an intention to inflict serious injury is forbidden by the rules of the game. In these cases, all players share an equal identity as participants and each bears an equal risk of injury. Engaging in such risky sporting activity appears to be perfectly consistent with an attitude of equal respect for others and it poses no real problem when we apply the defence of consent. Consent to the application of bodily force (perhaps to a tackle intended to bring a player down) is simply an exercise of the person's interest in controlling access to their own body. Given that in ordinary play, there is no intention to do any harm to the welfare of the other players, the conduct in tackling another does not carry any message of disrespect. Importantly, where players step outside the rules of the game and intentionally harm other players, they are held to have exceeded the scope of the consent, and the fact that the act took place during a consensual sporting contest is no bar to conviction.

At first glance, boxing appears to resemble these other sports: it is another physical contest where each participant acknowledges a reciprocal entitlement to apply force to the body of the other, and where (except in the case of a severe mismatch) each participant shoulders a similar risk of injury. However, the fact that distinguishes boxing from other sports, is the express aim of inflicting damage and not merely force to the body and the brain of the other participant. For this reason, consent cannot be

¹⁴⁰ See Ashworth, *Principles of Criminal Law*, above footnote 121 at 323-329.

¹⁴¹ See *R v Brown* [1993] 2 All ER 75 (HL). Ashworth, *Principles of Criminal Law*, above footnote 121, also discusses the 'horseplay' exception, allowed in *Aitken* (1992) 95 Cr App R 304. Under the respect based account, no kind of conduct like dousing a person with flammable spirit and setting them on fire could be defended by proving consent. I argue that this decision is wrongly decided. As I have explained, we cannot criminalise conduct that involves risks only to the self; under the good life model the criminal law is concerned only with the way that we treat others. This would allow dangerous exhibitions or stunts so long as they do not risk harm to others.

allowed as a defence in cases of boxing or prize fighting under the good life model. It cannot be argued that the intention of rendering the other person unconscious is compatible with an attitude of respect for either the short term or the long term welfare of the other person. All that can be accepted is that there is no invasion of the other person's autonomy. The respect based account of the defences suggests that boxing and prize fighting are not properly allowed as an exception to the usual rules on consent, and I suggest that the fact that we allow the defence in lesser cases like assault and battery may best be explained by the *de minimis* exception.

Some cases of sado-masochism may also be allowed under the good life account of the defences, provided the activities are designed to inflict only pain and humiliation. As I explained in section 11.2 (c), the experience of pain is one that people may interpret differently, and if a person has consented to experiencing such a bodily stimulus, the act of inflicting that sensory experience is compatible with an attitude of equal respect. Consensual, minor applications of bodily force, like certain beatings, whippings, brandings, piercings and sandpaperings¹⁴² that do not risk serious bodily harm or serious wounds, may therefore be allowed under the respect based model.

Under this account of the consent defence, the mere presence of consent to any conduct intended to cause serious bodily harm or serious wounds, cannot be accepted as rebutting the presumption of fault. This is because the respect based account of the consent defence requires that, before we can excuse an act that inflicts bodily harm (as opposed to bodily force) on another with their consent, the accused must have acted with complete and unequivocal respect for the equal value of the other person and must have treated both their welfare and their autonomy interests as carrying a value that is equal to their own. This means that the only exception that we should permit is the *de minimis* exception which allows consent to provide a defence only for minor acts of sado-masochism and only for minor cases of assault and battery. Any other act that goes beyond this threshold and is intended to inflict any serious bodily harm or significant wounds to another (or which risks such harm) is not compatible with respecting the equally shared interest of another in physical wellbeing, and so in these cases, consent cannot provide a defence. In cases where serious harm or wounds are intended we can mitigate the penalty on the grounds of consent because consent rebuts the presumption that the accused has failed to respect the equally shared

¹⁴² See *R v Brown*, above footnote 141.

autonomy interests of another, but we cannot waive it altogether because consent cannot rebut the presumption of fault that arises because the accused has failed to respect the equally shared welfare interests of their victim.

This discussion has pointed up an important difference between the role played by the dimension of harm at the two stages of legislation and conviction. When legislating the criminal law we can satisfy the 'harm to others' criterion by showing that the conduct directly threatens or risks some harm *either* to the autonomy *or* to the welfare interests of another. But when applying the defence of consent we can rebut the presumption arising from some harmful conduct only if we are satisfied that the accused is completely without fault. This requires us to be convinced that the accused has respected *both* the welfare *and* the autonomy interests of others. The good life model allows us to accept that a person may act to protect the foundational welfare interest that a person has in life at the cost of the lesser welfare interest in bodily integrity but it does not allow one person to weigh another person's autonomy interests against their interests in welfare. The role of harm is crucial, therefore, not simply because our welfare and autonomy are important interests in themselves, but, just as importantly, because the attitude that a person displays to those factual harm based interests of others reveals whether or not they have respected them as equals.

I have attempted to show that the defences can plausibly be seen as favouring the dimension of equal respect above the dimension of harm by demonstrating that whenever we interpret an accused's conduct as being consistent with treating others as equals, we do not convict, regardless of whether the conduct has caused harm, has risked harm, or was intended to do harm. A similar result occurs whenever there is evidence that the accused was incapable of recognising and/or responding to the equal value of others. Even though other interpretations of the defences may be possible, and some modifications of our current rules appear to be warranted, the general pattern of the defences is consistent with this hypothesis.

These defences fall into three groups; the first contains the defences of insanity, immature age, mistake of fact and some cases of mistake of law; the second contains self defence, defence of another, (possibly) some cases of provocation, and covers combatants fighting in armed conflicts; and the third contains the defences of necessity, duress and consent. In the first group, the facts about an accused's internal state of mind, belief or knowledge cast a reasonable doubt on the accused's capacity either to recognise or to respond properly to the equal value of others. By contrast, in

the second class of defences, it is the external circumstances surrounding the accused's conduct that prevent us from characterising it as a failure of equal respect. Necessity, duress and consent combine aspects of both groups. In these cases we look both to the external circumstances and to the accused's state of mind to ascertain whether their conduct is unequivocally, completely and relevantly respectful of the equal value of the interests of others. In every case, no matter how severe the harm or how important the right that has been violated by the accused's conduct, once we either doubt the accused's factual capacity to respect others as equals or have accepted that they have in fact responded to another as an equal, we will not convict.

These observations suggest that our criminal law does not aim simply to protect our harm based interests in welfare and autonomy from intentional attacks. On my account, it aims above all to respond to any person whose conduct fails to give the proper respect to the interests that we share equally with others. We use our recognition of the fact that these harm based interests are shared equally as a way of identifying the conduct that we will forbid and we forbid and punish this conduct because we interpret it as treating the other person as less than an equal. An appreciation of the two factual and normative dimensions of the good life are, therefore, essential to our understanding of the criminal law. Unless we have first identified the categories of our factual equality, we will not be able to recognise the conduct that is animated by this special kind of disrespect and our criminal law would have no substance. Unless we recognise the way that our response to the normative respect based dimension of any person's conduct controls our responses to the harm based dimension, our criminal law will appear to have no principled heart and no morally defensible limits – either at the legislative stage or at the point when we must decide whether or not to convict.

The good life model reveals that the defences can be seen as united by a consistent recognition of the priority that we give to the principle requiring us to respect others by treating them as persons of equal value. As Andrew Ashworth's discussion of the defence of consent has shown, if we confine our analysis by focusing only on the two incommensurable aspects of welfare and autonomy, our current rules do appear to be inconsistent.¹⁴³ The good life model, by contrast, allows us to see more clearly the sense contained within our current system and this allows us to defend our practices

¹⁴³ Ashworth, *Principles of Criminal Law*, above footnote 121 at 323-329.

from charges that they are incoherent. This is partly because the model expands our vision from two to three elements by adding the element of respect to the elements of welfare and autonomy, but also because it explains more precisely the proper relationship that should exist between those three elements. The model insists upon the incommensurability of the two factual harm based elements of welfare and autonomy and it also insists that the normative element of respect must take priority in any clash. By using the normative to limit the factual, we can resolve the problems of incommensurability which bedevil the accounts that are based only on welfare and autonomy and we can present an interpretation of our system of criminal justice as a coherent, principled and consistent whole.

This conclusion confirms the suggestion made in the Introduction to this thesis that we should begin our search for justification in the criminal law by looking first at what we actually do rather than by analysing the theories dictating what we ought to do. It also suggests that once we see the sense contained within our criminal justice practices, we may have all that we need to guide and justify our conduct without ever having to enter the realms of moral philosophy or ever having to make a choice between the competing theories of punishment put forward by utilitarians and deontologists. However, before we can accept this suggestion, we must complete the evaluation of our criminal justice process and consider our decision to use hard treatment – or harm itself – as the currency of our responses to those offenders who have been convicted of acting with this special kind of disrespect for others.

11.4 Evaluating the sentencing decision to punish

This section has three aims. The first is to complete the simultaneous evaluation of our criminal justice system and the good life model by analysing the choices that we have made when punishing offenders at the sentencing stage of the criminal process. The second aim is to look beyond the borders of the criminal law to see whether the insights that we can derive from comparing and contrasting the different approaches to harm and wrongdoing found in our two systems of criminal and civil justice can point us toward a justification for our choice to use harm itself as the form of our responses to offenders convicted of crimes. The third is to challenge the commonly

stated view that before we can construct a morally acceptable theory of the criminal law, we must first agree upon a theory of the purposes of punishment.¹⁴⁴

In this final part of the evaluation, I want to confront head on the problem of harm and its role in criminal punishment. I hope to show that we do not have to embrace either the utilitarian or the retributive accounts of the criminal law before we can defend and justify our current criminal justice practices and the place given to the concept of harm within these practices. Under the good life model we are liberated from the impossible duty required by retributive theories to impose a measured amount of harm upon offenders in return for the measured amount of wrongdoing or harm for which they are responsible. We are also liberated from the equally impossible duty required by utilitarian theory to impose a precisely measured amount of harm on offenders that we know is exactly enough to deter harm producing wrongs that might otherwise be committed. However, although the good life model allows us to avoid having to embrace either of the retributive and utilitarian theories of punishment, it does not require us to jettison our commitment to proportionality in punishment and parity between offenders, or to let go of our devotion to the consistent application of principle that aims to treat like cases alike and different cases differently, which characterise our current common law of sentencing. This is because the good life model contains at its heart, a distinctive and fundamental conception of equal justice, that in itself imposes certain limits on our responses to those who have breached their duty to respect others as equals. I will argue that once we recognise this conception of equal justice and understand the purposes behind our criminal laws we do not need any philosophical theory of the purposes of punishment to tell us how to respond either to acts of wrongdoing or to acts of harm-doing.

My interpretation of the criminal law was derived from an analysis of the facts about ourselves, our shared identities, our current political community, and the kinds

¹⁴⁴ See eg: Alexander, 'The Philosophy of Criminal Law' above footnote 58 at 815; Bagaric M, *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001); Coleman J, *The Practice of Principle* (Oxford University Press, 2001) discussed in Harcourt BE, 'Joel Feinberg on Crime and Punishment: Exploring the Relationship Between *The Moral Limits on the Criminal Law* and *The Expressive Function of Punishment*' (2001) 5 *Buffalo Criminal Law Review* 145 at 155-156; Hurd, 'What is Wrong?' above footnote 49 at 157; Lovegrove A, 'Judicial Sentencing Policy, Criminological Expertise and Public Opinion' (1998) 31 *Australian and New Zealand Journal of Criminology* 287; and Moore, *Placing Blame*, above footnote 58 at 23-35.

of lives that we want to live. It revealed a special conception of criminal justice that is based on our vision of ourselves as equals who live together within a community of equals. In this section I want to begin by constructing a parallel account of the distinctive features of our system of civil or private law with the aim of comparing and contrasting the distinctive responses to harm and wrongdoing found in the civil law with those found in the criminal law. This discussion does not purport to present a complete theory of the civil law. Rather, it aims to test the usefulness of the good life model one last time by seeing not only whether it can explain why we continue to maintain two separate systems of criminal and civil justice, but also whether it can clarify the reasons why these two paradigms of justice are marked out by two distinctive ways of identifying wrongdoing and by two distinctive responses both to the fact of wrongdoing itself and to the harm that flows from it. I will focus on six different points of comparison which are outlined in Table 11.2 and which are:

- the different factual foundations upon which the two systems are based;
- the different sources of vulnerability to suffering harm that they protect;
- the different moral focus and purpose behind each legal paradigm;
- the contrasting nature of the resulting legal duties;
- the different responses to breaches of those duties; and
- the different conceptions of justice contained within each system.

In each case, I will argue that the key to understanding the difference behind our two systems of justice lies in contrasting our shared identity and equal status as human beings and members of the community, which are the focus of the universal duties imposed upon us by the criminal law, with the particular identities, the specific roles and the special relationships that connect (only) some individuals with other individuals, which appear to be the main focus of the civil law's protection. Tort law combines features from both paradigms and stands as an anomaly within my classification; as I will explain below, many of the duties that tort law imposes fit the criminal justice pattern, but the legal responses that it provides follow the paradigm of civil justice.

TABLE 11.2 SIX DIFFERENCES BETWEEN THE CRIMINAL LAW AND THE CIVIL LAW		
	THE CRIMINAL LAW	CIVIL OR PRIVATE LAW [excluding tort law*]
1 . FACTUAL FOUNDATION: SIGNIFICANT IDENTITY	Equal identity and shared status as: <ul style="list-style-type: none">• human beings;• members of a political community;• animals.	Particular identities contingent upon specific circumstances, status, roles or relations, eg: <ul style="list-style-type: none">• contractual relations;• business, professional, trust and fiduciary relations;• public official and citizen;• family, marriage relations;• relations to land, property.
2. SOURCE OF VULNERABILITY TO SUFFERING HARM	Equal vulnerability which arises simply by virtue of each person's nature as a human being and as a member of the community.	Special vulnerability which arises from the relationship between the parties and/or the particular circumstances that they find themselves in.
3. MORAL FOCUS AND PURPOSE	<ul style="list-style-type: none">• The equal abstract moral and political value of every person;• our shared purpose of pursuing the good life in a community bound together by universal relationships of humanity, community and equality.	<ul style="list-style-type: none">• The special value of the bilateral relationship existing between the two parties; and• the importance of the particular purpose behind their specific interaction.
4. RESULTING DUTY	Universal, reciprocal duties to treat the equally shared interests of others as being equal in value to one's own.	Special, limited, bilateral and contingent duties owed only by specific individuals to other specific individuals.
5. COMMUNITY RESPONSE TO A BREACH OF THAT DUTY	<ul style="list-style-type: none">• The state responds in every case to the fact of the conduct itself by imposing punishment on all wrongdoers once they have been found to be criminally responsible.• Because all human beings share equal interests in welfare and in autonomy, equal punishment can be imposed in every case. Result: like offenders can be treated alike.	<ul style="list-style-type: none">• If victims can prove their cases, the state will order any and all wrongdoers found liable, to make redress by: performing their duty; and/or compensating the victim for the harm done.• The enforcement of these remedies is also contingent; it depends on the ability of the wrongdoer to comply with an injunction or to pay damages. Result: like victims are not necessarily treated alike.
6. VISION OF JUSTICE	Equal, universal justice	Particular, individual justice
* NOTE: Tort law is an anomaly: many of the duties that it imposes fit the criminal pattern, but the legal responses that it provides follow the paradigm of civil justice.		

I argued in Chapter Ten that our criminal law imposes a duty on each one of us to conduct ourselves in such a way as to respect the factual, moral and political equality that we share with others. I suggested that the different respects in which we see ourselves as equal to others supply the foundations for classifying the different kinds of crimes that our criminal law contains, and can account for the distinctive nature of the duties imposed upon us by the criminal law. The factual basis underlying the duties imposed by the civil law is very different and an analysis of the circumstances that lead to the imposition of civil liability and the distinctive nature and scope of the duties and remedies created in response to those circumstances not only offers us another opportunity to test the validity of the good life model, but it also allows us to complete our investigation into which one of the two principles found within that model is given greater priority by our legal system itself.

Peter Cane has argued that the central feature of the private law of obligations is its ‘correlative’ or ‘bilateral’ nature which ‘organizes relationships between individuals on a one-to-one basis.’¹⁴⁵ By contrast, one of the central features of the criminal law is its universal nature, which as we have seen, organises the relationships between all individuals on a community wide and reciprocal basis. The universal duties imposed on us by the criminal law bind us all in the same way: they are almost always reciprocally and equally owed by each person within the community to all others present in a particular jurisdiction who are recognised as sharing the same identity and equal status within a class, either as human beings, as animals, or as members of the community.¹⁴⁶ However, many of the particular obligations imposed on us by the civil or private law to respect the particular interests of others do not appear to be based on our status as equals, but are derived instead from the particular circumstances and the special relationships that we find ourselves in and the particular status and identities of the individuals with whom we find ourselves in proximity.

Many of the private duties that we owe to others arise because of a particular identity or a special status that defines our relationships with others (for example, an

¹⁴⁵ Cane P, *The Anatomy of Tort Law*, (Hart Publishing, Oxford, 1997) at 11-12. See also Weinrib EJ, *The Idea of Private Law*, (Harvard University Press, 1995) for a different account of correlativity. I classify tort law as an anomaly, but Cane’s distinction is, nevertheless, valid within my scheme.

¹⁴⁶ As I explained in Chapter Ten, the duties owed by humans to animals are not reciprocal, neither are the special duties owed by persons of full capacity to children or persons of unsound mind. Both exceptions are, however, explained by the equality principle: see section 10.3 of Chapter Ten.

identity as a teacher, a lawyer, a doctor, an accountant, a public servant, a trustee, a partner, an employer or employee, an agent, or a company director, etc) and they are strictly limited by the circumstances that give rise to those duties. These legal duties appear to be directed towards providing us with protection for the particular vulnerability to suffering harm which is created by those specific relationships or those particular identities. They reflect, not our fundamental vision of our equal value, but the special value that we place on the particular purpose that is seen as governing the particular bilateral relationships that exist between specific individuals.

Unlike the universal and reciprocal duties that each person owes to all others under the criminal law (for example, not to murder, rape or steal, or to avoid conspiring with our enemies, corrupting our electoral processes, monopolising our resources and public facilities or polluting our waterways, etc), most of the specific duties created by the civil law apply only on a limited and contingent basis. So, for example: we owe contractual duties only to those with whom we have exchanged promises supported by consideration; we owe the duties of marriage only to the person with whom we have exchanged wedding vows; we owe a duty to consider the best interests of others – not to everyone – but only to those persons to whom we stand in a special fiduciary or contractual relationship like trustee and beneficiary, teacher and pupil, parent and child, doctor and patient, director and shareholder, etc.

Both forms of criminal and civil justice ultimately protect our harm based interests in welfare and autonomy – and for this reason it should not surprise us that both contain a similar account of the concept of harm. However, the analysis produced by the good life model in Table 11.2 suggests that these different forms of protection are justified on different grounds and not only contain a different moral focus, but also protect different kinds of relationships and express a different assessment of value. We are not equally and universally connected to all others within our community by contractual, family, fiduciary, employment, partnership or agency relations, etc, and, despite the fact that we can be harmed by others once we do become connected to them in these special relationships, the duties themselves are not derived from any universally shared status as equals or common purpose of living together as a community of equals. They are derived instead from the special nature of the circumstances and the specific purposes that bring two particular people together. Moreover, our grievances against those who harm us in these special ways derive not necessarily from the fact that they have failed to respect us as an equal, but from the

fact that they may have failed to respect the particular purpose that brings us together or the reason for the relationship that itself created our vulnerability to the acts of others or placed our interests directly in their hands.

So, for example, another's failure to fulfil a contractual promise may aggrieve us, not because it is necessarily interpreted as an act of personal disrespect (it may simply be an unavoidable inability to perform), but because we may suffer as a result of the breach by having relied upon the promise and organised our affairs on the strength of the legitimate expectation that it had created. In these cases, the law stands up for the particular value that our community places on these special promises and protects those who suffer harm as a result of their particular vulnerability to others who have made these promises. Similarly, a mistake made by a public official that cancels our driver's licence, overcharges us our land tax, or incorrectly denies us a welfare benefit, is certainly harmful, but we do not see this conduct as a fundamental failure by that official to respect us as an *equal*. Rather, it may be interpreted as a failure by the official to respect us in our capacity as a *claimant* or as a *taxpayer*, with a particular entitlement to be treated according the legislative provisions governing the state's distribution of public benefits or burdens.¹⁴⁷ Consequently, the law stands up for the special value of the legislation's purpose and protects the victim from any harm by directing these officials to make their decision again according to their duty. Similar responses can be found throughout the law of agency, trust law, partnership law, company and commercial law, family law, and even property law, which governs the particular relationships between persons and property, both real and personal.¹⁴⁸

Conduct that amounts to these civil or administrative wrongs clearly satisfies the 'harm to others' requirement. If the harm principle stood alone, we would have to

¹⁴⁷ Of course, within that particular distribution of benefits and burdens, justice [as Aristotle reminded us in *The Nichomachean Ethics*, (Oxford University Press, 1998) at 112] requires that like cases should be treated alike and equal cases equally, but my point is that the parties to such a transaction (in their roles as official and claimant) do not share any equal interest by reason of any equally shared identity or equal status and so there is no fundamental reciprocal obligation between the parties to treat one another as an equal by treating that interest as equal in value to their own.

¹⁴⁸ Family and property law stand out as special classes, because they also fulfil a separate function of defining the relationships between persons, and between persons and property (both personal and real). Once these relationships have been settled, various obligations then descend upon persons in those defined relationships and various duties to respect those relationships are imposed on others.

consider declaring the breach of every one of those duties to be a criminal offence. However, because such conduct is not necessarily and unequivocally seen in all cases as carrying a false message of relative value, and because the basis for imposing the duty is not to protect any interest shared equally by both parties that arises from their equal status or identity, such conduct does not satisfy the second legislative principle contained in the good life model which requires that, before we criminalise certain conduct, we are able to interpret it as a failure to respect the equal value of others.

These examples illustrate once more our need for a supplement to the harm principle when we are legislating the criminal law and demonstrate again the power of the equal respect principle, which provides the feature that both unifies all crimes and at the same time can help us to distinguish criminal wrongs from other legal wrongs. Certainly, this discussion has confirmed that the harm principle on its own cannot set the boundaries, because the conduct forbidden under both paradigms of justice does threaten or risk harm to the interests of others. So, although the good life model suggests that both principles are essential to give actual substance to the criminal law at the legislative stage, the fact that the equal respect principle provides us with the unifying and the distinguishing mark of a crime indicates that the equal respect principle is the more important of the two. This conclusion offers support to the view expressed in the discussion of the defences that we give priority to the normative over the factual at the later stages of the criminal justice process when we have to choose between responding to the harm based and the respect based aspects of a crime, and in the rest of this section I will adduce further evidence that supports this view. However, before moving to the analysis of the sentencing decision itself, I want first to consider the other distinguishing mark of our system of criminal justice and compare the institution of criminal punishment with the remedies that are provided by the civil law. Once I have explored these distinctions I will briefly discuss the law of torts, which presents as an instructive anomaly because many of the duties that it imposes bear the hallmarks of the criminal law, yet the legal responses that it provides following a breach of those duties match those of the civil law.

Once a breach of any of our civil duties (including those imposed by tort law) has been proved, the law directs that action should be taken by the wrongdoer to redress the wrong that has been done to the victim, and in all cases the purpose behind the relationship between the parties and the extent of the harm done to the victim will limit the responses that a court will order. This plaintiff oriented order may take the

form of an injunction commanding performance in cases where the harm can be redressed by conduct (for example, in trust law where a trustee can disperse funds held on trust to a beneficiary, in contract law where a promise can be performed, or in administrative law where a decision can be re-made).¹⁴⁹ An award of compensatory damages will be made in the cases where the harm done by the breach of duty cannot be undone by performance and where we content ourselves with compelling redress in the form of money. These legal responses are designed to undo the effects of the wrong by ordering the wrongdoers themselves to make amends to their victims. In this sense our civil justice system seeks a perfect form of justice because the single act that publicly sanctions the wrongdoing not only makes the wrongdoers personally responsible for dealing with the harm done to the victims, but at the same time it also imposes a detriment on the wrongdoers, who suffer as a result of their conduct.

We should note, however, that there are limits upon the remedies which we are prepared to enforce in the civil law. The availability of these remedies is, just like the significant identities and relationships that give rise to the duties, contingent upon circumstances. In cases where a wrongdoer cannot perform the obligation created by the special relationship that exists between the parties or does not have the assets to comply with an order for compensation, the state will allow the plaintiff to bankrupt the wrongdoer, but it will do no more to right the wrong or to redress the harm. Under the civil law, therefore, like victims are not necessarily and in all cases treated alike because they must take their wrongdoers as they find them. In modern times, if a wrongdoer is incapable of making redress, no further action beyond bankrupting the wrongdoer can be taken – no matter how extensive the damage that has been done.

In previous times, however, some societies were prepared to go further to ensure that the damage done to victims was redressed and in order to understand why we do not as a community adopt the civil system with its ‘perfect’ vision of justice as our only paradigm of justice we need to see why in modern times we cannot resort to these methods of responding to the harm done by an act of wrongdoing. In the past, if a wrongdoer did not have the personal means to make amends, communities dealt

¹⁴⁹ In administrative cases the harm done is redressed by a direction to the state official to make the decision again according to law and this is generally seen as sufficient redress without further award of damages. Administrative law is often classified as part of public law because the state is a party. However, I suggest that these cases display the same features as many forms of private law.

with the problem in one of two ways: either by spreading the loss among a wider group related to the wrongdoer, or by enslaving the wrongdoers themselves and putting their bodies and labour at the disposal of the victims.¹⁵⁰ The first option was favoured in times when kin-groups, clans or tribal membership supplied the core of each person's social identity and dominated and defined their relations with others. In these cases, the communities identified the wider group as the 'person' who was legally responsible for making amends for the wrong, despite the fact that the person responsible for the initial act of wrongdoing was a single individual. The issue that determined liability under this system was identity, not personal responsibility,¹⁵¹ and the crucial relationships were those of blood or tribal membership.¹⁵² By separating

¹⁵⁰ The Symposium on the Tort/Crime Distinction (1996) 76 *Boston University Law Review* contains many helpful contributions including: Frankel T, 'Lessons From The Past: Revenge Today and Yesterday' at 89; Katz L, 'A Look at Tort With Criminal Law Blinders' at 307; Lindgren JL, 'Why The Ancients May Not Have Needed a System of Criminal Law' at 29; Seipp DJ, 'The Distinction between Crime and Tort in the Early Common Law' at 59.

The early law codes which I have consulted are listed in footnote 118 in Chapter Nine.

The following alphabetical list contains the other sources that I have found to be most useful:

Baker J, *An Introduction to English Legal History*, 3rd ed, (Butterworths, London, 1990);

Boldt R, 'Restitution, Criminal Law and the Ideology of Individuality' (1986) 77 *Journal of Criminal Law and Criminology* 969;

Hoebel EA, *The Law of Primitive Man*, (Harvard University Press, 1954);

Jeffery CR, 'The Development of Crime in Early English Society' (1957) 47 *Journal of Criminal Law and Criminology* 647;

McCormack G, 'Revenge and Compensation in Early Law' (1973) 21 *American Journal of Comparative Law* 69;

Miller WI, 'Choosing the Avenger' (1983) 1 *Law and History Review* 159;

Mueller G, 'Tort, Crime and the Primitive' (1955) 46 *Journal of Criminal Law and Criminology* 303;

Rubin S, 'The *Bot*, or Compensation in Anglo-Saxon Law' [1996] *Legal History* 17;

Stephen JF, *History of the Criminal Law, Volume I and Volume II*, (MacMillan, London, 1883);

Vinogradoff P, *Outlines of Historical Jurisprudence, Volume II*, (Oxford University Press, 1920);

Whitman JQ, 'Ancient Rights and Wrongs' (1995) 71 *Chicago-Kent Law Review* 41;

¹⁵¹ See Boldt R, 'The Ideology of Individuality' above footnote 150 at 991-993, 1005.

¹⁵² This applied equally to the distribution of the compensation amongst those on the victim's side. See Vinogradoff, *Outlines*, above footnote 150 at 165-196, who explains that the closeness of the tie between the wrongdoer and the other members of the group determined the proportion of the compensation that each particular member of the group must contribute. The victim's group then

the initial issue, of recognising who was responsible for carrying out an act of wrongdoing and causing harm, from the second issue, of deciding who should take responsibility for making amends for that harmful act of wrongdoing, these societies were able to ensure in every case that the wrongdoing was publicly sanctioned, that the wrong to the victim (or the victim's group) was redressed and that any harm was made good.¹⁵³ In our own times, our commitment to the notion of personal responsibility prevents us from adopting this solution but we do sometimes allow for loss-spreading through insurance. However, this solution is allowed only in limited cases and again, even in these cases, the victims' chances of being compensated are contingent upon the foresight of the wrongdoers and their capacity to pay for adequate insurance cover.¹⁵⁴

The second method of avoiding the problem caused by a wrongdoer's lack of means was more extreme. It involved reducing the wrongdoers to the status of a slave and giving them into the hands of the victims (permanently in serious cases, or in minor cases, for a set period only).¹⁵⁵ Generally, this remedy applied to the wrongdoer himself, however, in some cases of serious wrongs or massive damage a wrongdoer's entire family might be enslaved. In other cases, if the wrongdoer had family members who might serve out the debt, his wife or children might be given over instead. This approach to the problem which supplements the compensation system by resorting to a second system of punitive sanctions is ruled out in our times because it involves denying our fundamental belief in each person's sovereign right to be treated as a free and equal autonomous individual that defines us as democratic communities.¹⁵⁶

distributed the compensation money to its members by following the same rule: the closer the relationship with the victim, the greater the share of the compensation.

¹⁵³ There have always been some kinds of wrongdoing that were considered to be beyond normal measures of compensation. Incest, for example, is almost universally seen as a crime that is beyond undoing and which attracts a public, and recognisably criminal, sanction: see Boldt R, 'Restitution, Criminal Law and the Ideology of Individuality' above footnote 150 at 993-995.

¹⁵⁴ Of course some kinds of civil wrongs (eg, the intentional torts) cannot be insured against. I will discuss the anomalous case of tort law shortly.

¹⁵⁵ See Lindgren, 'Why the Ancients May Not Have Needed the Criminal Law' above footnote 150.

¹⁵⁶ Slavery was discussed above in the text at footnotes 87 to 90. There are some current legal theorists who have actually argued for a return of debt slavery (and extreme torture) in an effort to implement an inhumane system based on the *lex talionis*: for example see Kinsella NS, 'A Libertarian Theory of Punishment and Rights' (1997) 30 *Loyola of Los Angeles Law Review* 607.

As a community we have to decide how far we are prepared to go within our system of civil justice when we require wrongdoers to compensate victims for the harm that they have done. Once we choose to recognise ourselves as individuals who are personally responsible for our own actions, and to define ourselves, not as members of a tribe or a family, but as equal citizens living in a democratic political community, the first solution of spreading the cost of every kind of wrongdoing is lost to us, just as the second solution of slavery is closed to us. Both are ruled out because they require us to deny two of our fundamental and defining beliefs about ourselves. Before we saw ourselves as members of democratic communities, however, there was a time when we were willing to imprison debtors in order to coerce payment, but more recently our insolvency laws have offered those whose debts (including the liability to pay civil damages) are beyond their capacity to pay, a means of ending the matter and discharging their debts through bankruptcy.¹⁵⁷

If we use the two dimensional good life model to analyse the value judgement lying behind our community choice to allow some wrongdoers to escape from their personal responsibility for wrongfully harming others,¹⁵⁸ the answer that we have given to this dilemma is revealed. In cases where the civil duty protects our bilateral relationships and our special vulnerability to suffering harm that results from these special relationships, the ultimate limit that we place on the legal responses to the harm done to victims is derived from our conception of ourselves as free and equal citizens, entitled to be respected and treated by others as persons of a certain dignity, worth and value. By refusing to destroy the liberty and dignity that arises from our

¹⁵⁷ See Finnis J, *Natural Law and Natural Rights*, (Clarendon Press, Oxford, 1980) at 188-193. In some jurisdictions, punitive damages awarded in tort cases cannot be discharged through bankruptcy, thus illustrating again the exceptional hybrid status of tort law: see Feinberg J, *Harm to Others*, (Oxford University Press, 1984) at 248.

¹⁵⁸ Another method of allowing wrongdoers to escape from their common law liability in negligence cases is to introduce universal accident insurance schemes: Palmer G, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44 *University of Toronto Law Journal* 223; Cane P, *Atiyah's Accidents, Compensation and the Law*, 5th ed (Butterworths, London, 1993). Howarth D, 'Three Forms of Responsibility: On the Relationship Between Tort Law and the Welfare State' (2001) 60 *Cambridge Law Journal* 553 at 566 argues that collective responsibility of this kind is aimed, not at aiding victims, but at relieving tortfeasors of their responsibilities to others and maintains (at 572-573) that we need to retain our system of tort law to make it clear to all that we can be held to be individually responsible for certain kinds of conduct that do harm to others.

universal and equally shared relationships of humanity and community for the sake of protecting our limited and bilateral relationships, we appear to have chosen – even in our design of our civil justice system, which is seen as a harm focused practice – to value the dimension of equal respect more highly than the dimension of harm.

These features of our current civil justice system, which has a double focus on both victims and wrongdoers, have the consequence not only that like victims cannot always be treated alike, but also that like wrongdoers will not be treated alike. So, although our system of civil or private justice is often presented as a harm-focused, victim-oriented practice that maintains standards of ethical conduct and deters wrongdoing, the facts are that it offers only limited and contingent protection to victims and that it does not ensure that justice is always done – either to victims who have been harmed, or to wrongdoers who have breached their civil obligations. The state allows plaintiffs the luxury of taking legal action within the civil justice system if they so choose (and if they can afford to bring their actions), but it does not take any interest in or responsibility for pursuing justice on their behalf. The justice done by our system of civil law aims ambitiously for a perfect form of justice that will serve four functions: to publicly sanction the wrongful conduct; to uphold the value that we place on the special bilateral relationships that bind the wrongdoers and their victims together; to impose a detriment on wrongdoers as a result of their conduct; and to hold those individual wrongdoers personally responsible for restoring the victim as far as it is possible to do so. Unfortunately, the civil law's vision of perfect justice is unattainable, not simply because the execution of its remedies depends in every case on the means of the wrongdoers, but more fundamentally, because we are not willing to enforce these harm-based remedies at the cost of the liberty or dignity of the wrongdoers. Because our civil justice system refuses to treat like wrongdoers alike, it will also fail to treat like victims alike and we must therefore conclude that the particular and individual justice done by the civil law is the same as the duties it imposes – unequal, limited and contingent upon circumstances.

Things are different in the criminal justice system. This is so, partly because the criminal justice process has traditionally displayed a single focus on the wrongdoer alone, and partly because (until recently) it has not offered anything more to victims than the satisfaction of seeing the punishment of offenders. Just like our system of civil justice, our system of criminal justice does not aim to treat like victims alike. However, the choices that we have made in the criminal justice system, do allow us to

do the one thing in our criminal law that we have been unable to achieve in the civil law. They allow us to do equal justice every time a wrongdoer is convicted. I suggest that these choices – to ignore the victim, to limit the focus of our responses only to the offenders, and to use hard treatment as the form of our legal response to those offenders – reflect a consistent value judgement made by our community to the effect that it is more important to respond to those who have breached the defining norm of equal respect that characterises all crimes, than it is to repair the actual damage done by a crime or even to avoid doing any further harm to offenders and their families by our own practice of imposing punishment upon convicted offenders.

There are three special features that characterise our current sentencing practice and which distinguish the responses to wrongdoing imposed by the criminal justice system from those imposed by the civil justice paradigm. The first feature is the use of hard treatment or punishment by the state every time an offender is convicted of a crime. The second is the stated aim of equal treatment in all cases that is to be achieved by consistently treating like cases alike,¹⁵⁹ and the third is the principle of proportionality, which requires that the amount of hard treatment imposed by the state upon an offender must reflect the seriousness of the crime.¹⁶⁰ The analysis produced by the good life model, summarised in Table 11.3 below, suggests that the existence

¹⁵⁹ In Australia the classic formulation of the principle is to be found in Mason J in *Lowe* (1984) 154 CLR 606 at 610-611, and more recently in *Wong* [2001] HCA 64 per Gleeson CJ at [6]-[7]; Gaudron, Gummow and Hayne JJ at [65]; in *Cameron* [2002] HCA 6 per McHugh J at [44]-[45]; and in *Johnson* [2004] HCA 15 per Kirby J at [42]. The desire for equal treatment of offenders and consistency in sentencing has been expressed by legislators in Australia, Britain, Europe, Canada and the USA many times in recent years and is implicit in both legislative and judicial moves to introduce guidelines for sentencers: see eg, Ashworth A, *Sentencing and Criminal Justice*, 3rd ed, (Butterworths, London, 2000) at 48, 63 and 198; Fox RG & Freiberg A, *Sentencing: State and Federal Law in Victoria*, 2nd ed, (Oxford University Press, Melbourne, 1999) at 184; Ruby CC, *Sentencing*, 5th ed, (Butterworths, Toronto, 1999) at 16; Warner K, *Sentencing in Tasmania*, 2nd ed, (Federation Press, Sydney, 2002) at 28; Wasik M, *Emmins on Sentencing*, 4th ed, (Blackstone Press, London, 2001) at 45; and Wasik M, 'Going Around in Circles? Reflections on Fifty Years of Change in Sentencing' [2004] *Criminal Law Review* 253 at 255.

¹⁶⁰ In Australia the High Court endorsed this principle in *Veen (No 1)* (1979) 143 CLR 458; *Veen (No 2)* (1988) 164 CLR 456. See also references cited in footnote 159 above: Ashworth, *Sentencing and Criminal Justice*, at 90-131; Fox & Freiberg, *Sentencing: State and Federal Law in Victoria*, at 206, and 219-232; Ruby, *Sentencing*, at 19-27; and Fox RG, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

of the first feature can be accounted for by our overwhelming desire to respond, in every case, to breaches of the primary norm of equal respect which supplies the single uniting and distinguishing characteristic of all conduct that we currently call criminal. I will also suggest that the second and third features, rather than being forced upon us by the dictates of any utilitarian or retributive theory of ethics, both flow inevitably from our initial choice to stand up for that primary norm of equal justice which is itself derived from our vision of ourselves as persons of equal value and of our community as a community of equals.

In our criminal justice system, punishment – or hard treatment directed solely at making the wrongdoer suffer – is treated as a necessity. It is imposed as a matter of course only where we characterise the conduct as a breach of the duties set by the criminal law. While we do sometimes allow for punitive damages in the civil law, the availability of these awards is strictly limited, the damages are paid over to the victim, and they are not imposed as a rule in every case. In the criminal justice paradigm, by contrast, there is a presumption that, in every case, punishment of some sort will follow upon conviction.¹⁶¹ In fact, conviction alone, which transforms the offender from a citizen with an unblemished record into a criminal, is seen as a punishment in and of itself.¹⁶² The importance that we place on responding in this special way to the special kind of wrongdoing that we characterise as criminal is highlighted by the fact that criminal cases are brought by the state itself and are not left to chance or limited by the personal choices and the financial means of victims. Unlike the civil paradigm (where we coerce wrongdoers into responding directly to their victims only if they have the means to do so), we appear to insist in every case in the criminal law upon imposing a negative consequence or harm directly upon the wrongdoer in response to their negative act of wrongdoing.

¹⁶¹ See Gleeson CJ and Hayne J in *The Queen v Carroll* [2002] HCA 55 at [23], who state that:

At the very root of the criminal system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment.

In this case, the exceptional ‘reason to the contrary’ was supplied by the fact that it would have been an abuse of process to try the defendant, who had been acquitted of a charge of murder, in a second case for perjury (allegedly committed during the murder trial) because the prosecution for perjury inevitably sought to controvert the earlier acquittal on the charge of murder.

¹⁶² See Fox & Freiberg, *Sentencing in Victoria*, above footnote 159 at 69-70 and 229.

TABLE 11.3 TWO PARADIGMS OF JUSTICE

THE CRIMINAL LAW PUNISHMENT	THE CIVIL LAW PERSONAL REDRESS
<p>1. FEATURES</p> <p>Upon the conviction of each and every wrongdoer, the state aims to impose:</p> <ul style="list-style-type: none"> • hard treatment in every case; • equal treatment in all cases; and • proportionate treatment in all cases. <p>Single focus: on the wrongdoer alone. The victim is largely ignored.</p> <p>Form: a negative is returned for a negative. Direction: from the state to the wrongdoer.</p> <p>2. OUTCOMES</p> <ul style="list-style-type: none"> • The wrongdoing is publicly sanctioned and the value that we place on the norms of conduct that protect each person's primary entitlement to be respected by others and treated as a person of equal dignity, worth and value is upheld. • The wrongdoer suffers hard treatment. • The victims are mostly left to the civil law or to the welfare system. In some cases compensation orders may now be made. <p>3. ATTAINABILITY OF OUTCOMES</p> <p>The outcomes are attainable in all cases because all potential wrongdoers share the capacity to suffer hard treatment; and the focus is only on the wrongdoers.</p> <ul style="list-style-type: none"> • Victims are not all treated equally • Wrongdoers can all be treated equally. 	<p>1. FEATURES</p> <p>Once the victims bring and prove their cases, the state will order the wrongdoers personally to make redress to the victims:</p> <ul style="list-style-type: none"> • by performing their duty to the victims, or • by paying damages to the victims. <p>Double focus: on both the wrongdoer and the victim.</p> <p>Form: a positive that redresses a negative. Direction: from wrongdoer to the victim.</p> <p>2. OUTCOMES</p> <ul style="list-style-type: none"> • The wrongdoing is publicly sanctioned and the value that the community places on the norms of conduct that protect the special bilateral relationships that bind the wrongdoers and their victims together is upheld. • The wrongdoer suffers by making amends. • The victim is benefited because the initial harm is either undone by performance or redressed by compensation. <p>3. ATTAINABILITY OF OUTCOMES</p> <p>The outcomes are not attainable in all cases because not all wrongdoers have the ability to personally redress the harm that they have done to their victims.</p> <ul style="list-style-type: none"> • Victims cannot all be treated equally. • Wrongdoers cannot all be treated equally.
<p>4. CONCLUSION: criminal justice appears to be a necessity.</p> <p>The criminal law, by limiting its focus to the wrongdoer alone, delivers a certain and attainable vision of equal justice. It does equal justice to those who have failed to do equal justice to others.</p> <p>Key value judgement: We value the importance of responding to individuals whose criminal conduct has failed to respect others as equals more highly than we value responding to</p> <ul style="list-style-type: none"> • the harm done to victims, and avoiding • the harm done by punishing wrongdoers. 	<p>4. CONCLUSION: civil justice appears to be a limited luxury.</p> <p>The civil law, by widening its focus to include both the wrongdoer and the victim, aims for perfect justice but it is an unattainable vision. It delivers only uncertain, contingent and unequal justice.</p> <p>Key value judgement: Forcing wrongdoers to make full amends to their victims in every case (eg, by enslaving them) would deny their intrinsic dignity, worth and value as human beings. Civil justice (including tort law) is a luxury for the benefit of some, but not all, victims.</p>

I want to suggest that the reason why we have adopted this special response in the criminal law is the same as the reason why we have chosen to classify the conduct as criminal in the first place. I also want to argue that the value that we place upon the norm of equal justice has important implications for our own conduct when we respond to those who have breached that primary norm. I argued in Chapter Ten that the conduct forbidden by the criminal law is distinguished not simply because it is harmful, but because it is seen as a deviation from the primary norm requiring each one of us to respect others by treating them as equals. This suggests that our desire to respond in every case to proven breaches of the criminal law may be linked directly to the importance that we place on the norm of equal respect. If this is true, it means that the only form that our responses can take is to impose in some way upon the offender's welfare and autonomy. This follows for two reasons: first, because a law that has been created in order to uphold the equal abstract moral and political identity of every person cannot take that status away; and secondly, because any law that requires full compensation as the form of the response cannot be enforced in all cases. As I have explained above, once we have decided that we are not willing to deny any person's moral identity as a human being and their equal status as a member of a democratic polity, and once we have resolved that we will uphold our vision of ourselves as responsible individuals by imposing some kind of legal response for wrongdoing, all that is left as the focus of that response is the dimension of harm.¹⁶³

Michael Moore maintains that this form of response, which returns a negative for a negative, can be justified only by the moral imperative lying behind the principle of retribution.¹⁶⁴ On the other hand, utilitarians like Mirko Bagaric argue that inflicting this kind of harm on offenders can be justified only on the grounds that it will deter the occurrence of even greater harms.¹⁶⁵ Both streams of thought portray our acts of

¹⁶³ Neither can we adopt any of the measures like loss spreading, banishment, outlawry or slavery as sanctions that back up any system aimed at forcing wrongdoers into compensation. There is a third option: we could refuse to impose any sanction at all. However, this thesis is premised upon the view that the criminal law exists, and that some kind of response to breaches of that law must be made. I argue that the criminal law is based on a conception of equal justice and that the notion of equal justice mandates some system of hard treatment that focuses on either welfare or autonomy.

¹⁶⁴ *Placing Blame*, (Clarendon Press, Oxford, 1997) at 104-152.

¹⁶⁵ Bagaric M, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597 at 598-599; *Punishment and Sentencing: A Rational Approach*, (Cavendish, London, 2001) at 7, 41-44.

criminal punishment as morally right actions that are forced upon us as a moral duty by our antecedent allegiance to a particular theory of ethics. I argue differently. I argue that we are not *forced* to punish, but that we *choose* to punish for our own reasons. I maintain that our reasons can be found in our two part vision of the good life for human beings and argue that our choices can be defended on morally and politically acceptable grounds. We can justify our choice to use harm as the currency of our responses under the good life model, not because we are convinced that it is intrinsically good in and of itself to return harm for wrongdoing, nor because we are certain that using harm to deter harm will minimise the total amount of harm caused in the future, but primarily because, as a matter of logic and practicality, the only way to ensure that we can stand up every time for our common desire to count as an equal and to live in a community where each person is respected and treated by others as an equal is by exploiting our equally shared capacity for suffering harm through setbacks to our welfare or our autonomy.

Kant argued in a famous passage in *The Metaphysical Elements of Justice* that a civil society on the point of disbanding itself has a moral duty to execute the last murderer so that the 'blood guilt' will not be fixed on the people and so that they can avoid being regarded as 'accomplices in this public violation of legal justice.'¹⁶⁶ I say that a community of equals that does not choose to stand up for the equal value of each person within that community has in effect chosen to disband itself as a community of equals and has transformed itself into a different community entirely. And I maintain that once we have recognised our two dimensional vision of the good life, understood the conception of equal justice that is contained within our criminal laws and accepted our desire to continue to see ourselves as members of a community of equals, then the only way that we can be sure of doing 'legal justice' is to use the factual harm based elements of the good life as the single focus of that response.

The fact that our criminal law has traditionally excluded the option of making wrongdoers fully compensate victims confirms my suggestion that our primary aim in responding to the conduct is not to do something about the harmful aftermath of a crime, but to do something about the fact that the norm of equal respect has been breached. To illustrate this point, we can compare the responses of the criminal law and the civil law in a case where six wrongdoers jointly steal a sum of money from a

¹⁶⁶ (Bobbs-Merrill, Indianapolis, 1965) written 1797, at 101-102.

single victim. In the criminal law we would sentence each one of those wrongdoers to a proportionate punishment that reflects both the gravity of their crime and their individual culpability and we would pass six separate sentences of punishment upon the six separate wrongdoers. In the civil law, by contrast, we would insist only that the victim be compensated for the harm done by that joint act of wrongdoing. We do not insist that each wrongdoer suffer equally in making amends; neither are we concerned to make sure that the response imposed upon wrongdoers is proportionate to their act of wrongdoing or their degree of fault.¹⁶⁷ We are concerned that the harm done to the victim is undone, as far as possible, by an act of amends made by one or more of the wrongdoers. Within the civil justice system the harm done imposes the limits and controls our response. So, once the victim has been compensated, it is left to the wrongdoers themselves to resolve any questions relating to contribution.¹⁶⁸ Even in cases where no harm has resulted, for example, in a case of attempted murder where the victim remained oblivious to the danger, we still insist in the criminal law upon imposing punishment, whereas in the civil law, no finding of liability would be made in this scenario unless some harm to the victim had eventuated.

These examples show how the same factor of harm functions differently in each of the two paradigms of justice. They confirm again the suggestion that in the criminal law we are mainly concerned to respond, not to the harm done, but to the fact that this special kind of wrongdoing has occurred. Accepting this conclusion does not mean that the harm done by a crime is irrelevant to sentencing, because the duty imposed by the criminal law to do equal justice requires us to take into account all of the relevant similarities and differences between offenders when distributing punishment, and chief amongst these differences is the factual interest that has been threatened or harmed by their crimes. The point is, however, that while harm is a relevant factor, it is equal respect, and not harm, that is the dominating factor in the criminal law.

If we were to adopt a victim-oriented, harm based sanction rather than a punitive sanction, we would encounter problems of the kind I described above, which would prevent us from responding every time a breach occurs. Our focus on restraining

¹⁶⁷ For example, a moment's inattention, which causes massive damage can, if done in breach of duty, give rise to a disproportionately large damages award in the civil law if we compare it with the culpability of the tortfeasor. See Cane P, 'Retribution, Proportionality, and Moral Luck in Tort Law' in Cane P & Stapleton J (eds), *The Law of Obligations*, (Clarendon Press, Oxford, 1998) 141.

liberty as the ultimate sanction also reflects our desire to do equal justice. We do not see fines as universally appropriate because the poor and the rich will be treated differently. Because this offends our sense of equal justice, we use instead something like liberty, which we all value equally and which we can use every time we prove a breach. The fact that we maintain two separate systems of civil and criminal justice itself suggests that while we value the form of civil justice that requires personal redress for harm, we do not value it more highly than the form of criminal justice that requires us to do equal justice to others. I conclude therefore that our system of civil justice is in one sense a luxury that we maintain for the benefit of victims because of our commitment to the notion of personal responsibility, our belief in the virtue of making redress for harm that has been wrongfully inflicted upon others, and the value that we place on the special bilateral relationships that bind individuals to others. By contrast, we have chosen to treat responding to breaches of the criminal law as a necessity, because of our desire to maintain our vision of ourselves as members of a community of equals. This explains why the duties imposed by the criminal law overlap to some extent with those imposed by tort law: the criminal law exists because we wish to respond every time to those who breach the norm of equal respect; the law of torts exists because we wish, where possible and within certain limits, to allow victims to receive compensation for harm.

Our use of harm as the currency of our responses in the criminal law can be accounted for by two separate desires, each of which is derived from the fundamental importance that we place on the normative dimension of respect. The first is our desire to respond every time to the *conduct of others* that breaches this primary norm; the second is our desire to honour the norm of equal justice *in our own conduct* within the criminal justice system. If we wish to follow these desires and respond equally every time a breach is proved (and the evidence suggests that we do), then we must exclude any requirement that the wrongdoers themselves must repair the damage done to the victims and we must adopt hard treatment as the currency of our responses. It is only by limiting our focus to the wrongdoers alone and by using harm itself as our response that we can be certain that we can fully honour the fundamental norm of equal respect in our justice system, both when we make our criminal laws, and when we choose to respond to those who have breached those laws.

¹⁶⁸ See Fleming JG, *The Law of Torts*, 9th ed, (LBC Information Services, Sydney, 1998) at 288-301.

This interpretation suggests that it would be a mistake to portray our criminal justice system as a morally mandated reciprocal return of a measured amount of harm for a measured amount of wrongdoing. While our conduct in imposing a negative in return for a negative may well serve to satisfy the retributive urges of the victims and the community and to deter some potential wrongdoers from further acts of harmful wrongdoing as well, our use of hard treatment takes on a very different character from retributive punishments when viewed through the prism of the good life model. The model allows us to see the two dimensions of both our conduct and the conduct of the wrongdoers and to identify the similarities and the differences between them. When viewed at the factual level, our conduct does appear to resemble that of the wrongdoers because both our conduct and the wrongdoers' conduct threatens or actually causes harm. But this resemblance ceases once we consider the normative dimension of the conduct because our conduct carries a very different meaning.

The wrongdoers have been singled out because in their conduct they have failed to do equal justice to others: every one of them has failed to respect the primary entitlement of others to be treated as persons of equal value. However, our punitive conduct has a very different character by contrast with that of the wrongdoers' conduct, because we insist upon following the norm of equal respect when we punish. Our conduct in the criminal law is characterised by a commitment to equal treatment of equals in every case. So, while our conduct resembles the wrongdoers' conduct in the factual sense, it differs starkly in the normative sense. We do not simply return harm for harm or even like for like; we return just treatment for unjust treatment – and we choose to use hard treatment so that our goal of just treatment can be achieved. Under the good life model, wrongdoers are not treated as they have treated others, as the *lex talionis* suggests.¹⁶⁹ Neither do we universalise the standard lying behind the wrongdoers' conduct and adopt their (wrong-headed) standards as the guide for our own conduct, as Hegel suggests.¹⁷⁰ Rather, we remain true to our own standards of right conduct. We do equal justice to wrongdoers in order to stand up for our desire

¹⁶⁹ Under the good life model, we must follow Aristotle, who in *The Nichomachean Ethics*, (Oxford University Press, 1998) at 117 rejected Rhadamanthus' suggestion that 'right justice would be done' if 'a man should suffer what he did'.

¹⁷⁰ Dubber MD, 'Rediscovering Hegel's Theory of Crime and Punishment' (1994) 92 *Michigan Law Review* 1601 at 1607, citing Hegel GWF, *Elements of Philosophy of Right*, (Cambridge University Press, 1991), first published 1821, translated by HB Nisbet, at 99 (n.v.).

for equal justice from others. We do not return suffering to wrongdoers because it is morally right to do so or because it is guaranteed to deter greater harm, but because we choose to stand up every time – in the only way we can – for our moral and political entitlement to be treated as an equal among equals. The choices that we have made in the criminal justice system, just like the choices that we have made in our design of the civil justice system, can be interpreted as representing our community's judgement that it is more important to maintain our vision of our community as a community of equals and to respond to the normative dimension of respect than it is to respond to the factual dimension of harm.¹⁷¹ The fact that we use harm to autonomy and to welfare as our response to those who have offended against the norm of equal respect and do not use any sanction (like banishment or debt-slavery) that denies the equal entitlement that each person has to be treated as a member of the community of equals itself suggests that we value the dimension of equal respect more highly than the dimension of harm.

This interpretation of criminal punishment as a choice to use harm and not as a duty to impose harm has significant implications for sentencing. Once we see criminal punishment as a choice to stand up for the single foundational norm of equal respect that defines us as a community of equals, and not as a moral duty forced upon us by a utilitarian or deontological account of right and wrong, we are liberated not only from the obligation to impose the sometimes draconian punishments mandated by these two theories but also from having to attempt the impossible calculations that both theories would impose upon us.¹⁷² Once we have rejected the utilitarian view that our actions are justified only as a means of preventing even greater harm, we can rule out

¹⁷¹ Evolutionary economists have argued that retaliatory behaviour benefits a group by fostering sustained cooperation and minimising breaches of community norms. Even more interesting for the purposes of this argument, however, is the fact that human beings will punish even when it costs them to do so. A sense of fairness and justice leads humans living in groups to act in ways that are economically irrational. 'Economic man' who responds only to his own personal economic status does not appear to exist: Fehr E & Gächter S, 'Altruistic Punishment in Humans' (2002) 415 *Nature* 137; Sigmund K, Fehr M & Nowak MA, 'The Economics of Fair Play' (2002) 286 *Scientific American* 80; Nowak MA, Page KM & Sigmund K, 'Fairness Versus Reason in the Ultimatum Game' (2000) 289 *Science* 1773.

¹⁷² Davis J, 'The Science of Sentencing: Measurement Theory and von Hirsch's New Scales of Punishment' in Tata C & Hutton N (eds), *Sentencing and Society: International Perspectives*, (Ashgate, Aldershot, 2002) 329.

the punishment of innocents and we no longer have to try to measure the exact deterrent effects of our punishments or calculate the net amount of happiness that they will create within the community in order to be sure of doing justice.¹⁷³

Once we reject the retributivist view that it is morally good to return equal (or equivalent) suffering for wrongdoing, we do not have to try to measure the precise amount of harm done or the wrongfulness inherent in a crime and then try to find ways to convert those measures into an equally precise 'just measure' of punishment. We do not have to use the death penalty or devise grotesque physical harms to return to offenders as Kinsella does,¹⁷⁴ because we no longer see ourselves as bound to return like harm for harm. Under the good life model we can legitimately choose to respond to the harm done by offenders and to make a conscious assessment of the importance of the factual interests that they have threatened and the extent of the actual harm that they have caused, but this assessment is a matter of *evaluation*, not of *measurement*. As I explained in section 11.2, we are the litmus. Moreover, once we are freed by our vision of the good life from the impossible duty of trying to put right the imbalance created in a social, moral or divine order by imposing some kind of Newtonian 'equal and opposite reaction' in response to wrongdoing, we are also free to acknowledge the harm that our penal sanctions do to offenders and their families, and in fact, we are obliged by that same vision of the good life to try to reduce the level of our penal sanctions and minimise the harm that our punishments can cause.

By rejecting both retributivism and utilitarianism we can embrace the moral necessity to look for better ways of doing equal justice in our criminal justice system. If we wish to minimise the harm done to individual offenders by the punishments that we have imposed for our own purposes, we could add to our core practice of equal punishment, a second stage where we aim to restore and reintegrate offenders back into the community. Under the good life model we cannot abandon the requirement of equal treatment of offenders, and so we cannot replace the paradigm of criminal

¹⁷³ The extensive debate between retributivists and utilitarians over the punishment of innocents and the nature of the calculations necessary to ensure that we can achieve morally right actions has continued for many years. For a recent exchange see Bagaric M & Amarasekara K, 'The Errors of Retributivism' (2000) 24 *Melbourne University Law Review* 124 and Duff RA, 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara' (2000) 24 *Melbourne University Law Review* 411.

¹⁷⁴ Kinsella, 'A Libertarian Theory of Punishment' above footnote 156.

punishment with the paradigm suggested by proponents of restorative justice. However, we are free to reduce the levels of our punitive sanctions and introduce a range of restorative practices that are aimed at dealing with the aftermath of both the crime and its punishment and are directed towards restoring victims and offenders who have resolved their conflicts into safe communities.¹⁷⁵

If, as I have argued, our punishment practices can be justified as a matter of choice to stand up for the equal abstract moral and political value of every person in the community, and not as a matter of duty dictated by a theory of ethical value, then that same vision of ourselves as equals and of our community as a community of equals must also control our own conduct and our own punitive practices.¹⁷⁶ This means that we must accept the moral duty to ensure that offenders undergoing punishment are respected and treated as persons of equal dignity, worth and value. Once criminal punishment is seen as choice with a purpose rather than as a moral good involving a positive duty to inflict pain, it becomes clear not only that the harm that we choose to do must be limited as much as possible, but also that it must be controlled by our broader purpose of standing up for the fundamental norm of equal respect. So, while we might legitimately impose upon the offenders' opportunities to exercise their autonomy, we are obliged to make sure that our punitive practices do not impair their underlying capacity to exercise that autonomy in the future.

If we accept that our punishing practices are designed primarily to allow us to respond equally to every breach of the primary norm of respect, we will also be led to see the fundamental notion of proportionality in a different light. We can reject the retributivist view of 'cosmic' or absolute proportionality as an arithmetic relation of equivalence between an act of wrongdoing and a punishment, and see proportionality as an essentially comparative notion that flows inevitably from our commitment to treating like cases alike and different cases differently.¹⁷⁷ As Aristotle explained in

¹⁷⁵ I will return to restorative justice in the final conclusion to this thesis in Chapter Twelve.

¹⁷⁶ Similar sentiments are expressed by Duff who argues in *Punishment, Communication and Community*, (Oxford University Press, 2001) at 28: 'If I declare firmly that a certain kind of conduct is seriously wrong, that has implications for my own conduct.'

¹⁷⁷ The debate over whether desert or proportionality is essentially a 'cosmic' or a comparative notion continues, see: Alexander, 'The Philosophy of Criminal Law' above footnote 121 at 815 at 817-819; Galligan DJ, 'The Return to Retribution in Penal Theory' in Tapper C (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, London, 1981) 144 at 164-171;

The Nichomachean Ethics when he identified the essence of distributive justice, proportionality is a relationship of moral fit that is seen to exist between two persons and two burdens (in this case, two punishments) distributed by the state.¹⁷⁸ This allows us to preserve the principle of proportionality that is so important in modern sentencing law, provided that we conceive of the principle as reflecting a connotation of comparative justice rather than retributive justice. Under the good life model we can legitimately aim to see that all offenders receive their just deserts – so long as it is understood as an example of the operation of the controlling principle of equal justice. Offenders are entitled to receive, and we are obliged to limit ourselves to giving, only the amount of punishment that they deserve in the light of the punishments that we have distributed to others. But although we must give offenders equal punishments in this comparative sense, in no case are we obliged to give the offenders punishment that is equal to the harm or the wrong that they have done.

Once we see the problem of desert, proportionality and punishment, not as a matter of corrective or retributive justice, but as a matter of distributive justice controlled by the principle that equals must be treated equally and unequals unequally,¹⁷⁹ then our sentencing task becomes much easier. The first task is to identify the purpose of the state's distribution of the burden of punishment and then, using that purpose as our guide, to identify the relevant categories of similarity and difference that exist between offenders.¹⁸⁰ This exercise reveals the two sources of the state's double duty

Gardner J, 'Crime: In Proportion and in Perspective' in Ashworth A & Wasik M (eds), *Fundamentals of Sentencing Theory*, (Clarendon Press, Oxford, 1998) 31 at 38; Scheid DE, 'Constructing a Theory of Punishment' (1997) 10 *Canadian Journal of Law and Jurisprudence* 441; Shafer-Landau R, 'Retributivism and Desert' (2000) 81 *Pacific Philosophical Quarterly* 189 at 202, and 'The Failure of Retributivism' (1996) 82 *Philosophical Studies* 289, in particular the references to Feinberg, Montague and Hoffman in his footnote 31 at 315.

¹⁷⁸ Above footnote 169 at 111-114.

¹⁷⁹ The *Oxford Companion to Philosophy*, Honderich T (ed), (Oxford University Press, 1995) at 433, defines distributive justice as concerned with 'the ethical appropriateness of which recipients get which benefits and burdens' and points out that:

There is a presumption in favour of treating persons equally in distributive matters, unless some relevant difference can be specified to distinguish persons treated unequally. To treat persons unequally with respect to distribution of important benefits and burdens, in the absence of a justification, is a paradigm of injustice.

¹⁸⁰ Aristotle, *The Nichomachean Ethics*, above footnote 169 discusses distributive justice at 111-114. See also Hart HLA, *The Concept of Law*, 2nd ed, (Clarendon Press, Oxford, 1994) at 157-167.

to do equal justice between offenders: the first derives from our legislative purpose of standing up for the primary entitlement of each person within our community to be respected by others and treated as a person of equal dignity, worth and value; the second derives from our concept of justice itself and the requirement of distributive justice in particular which also mandates that equal cases are to be treated equally and different cases differently.

Having identified the purpose that controls our distribution of punishments, we must next identify the relevant similarities and differences between offenders. All offenders are equal in the sense that they have all been found guilty of breaching the fundamental norm of equal respect that unites and distinguishes all crimes. This common membership of the class of criminal offenders creates a bond of equality between all offenders which gives rise to a presumption of equal treatment. However, while all offenders are equal in this respect, there are also significant differences between them and under the good life model each of these relevant differences must be taken into account.¹⁸¹ Because each offender has broken a different law that protects a different factual harm based interest and each has acted with a different degree of fault, these aspects can vary widely: offenders threaten different interests and cause different kinds and amounts of harm; they display different attitudes towards others, they act upon different claims of value, they have different capacities to recognise and respond to the value of others and they act within different sets of surrounding circumstances.

The aspect of wrongdoing tends to drop out of sight in the sentencing process. This is because it applies uniformly and equally to all offenders. It tends to be most visible at the legislative and trial stages where we consciously focus on defining criminal wrongdoing and on convicting offenders of that criminal wrongdoing. By contrast, the things that occupy us most when we are sentencing are the variables that distinguish the offenders and mark them out as different from each other, namely, the harm that they have threatened or caused and the degree of fault that they have displayed. This explains our traditional formulation of the elements of the seriousness of a crime as

¹⁸¹ The great range of differences between offenders and our desire to take them all into account explains the value that we place on maintaining sentencing as a discretionary decision making process and our resistance to the introduction of rigid grid systems of sentencing that would reduce our judges' ability to respond to these relevant differences.

comprising the harm done or risked by the crime and the culpability (or fault) of the individual offender.¹⁸² However, while a conscious assessment of the matter of wrongdoing as a failure of respect may have disappeared in our current sentencing processes, under the good life model this aspect never ceases to be relevant to our decisions. Rather, it remains ever present as the controlling principle in the sentencing process that guides and limits our responses both to offenders and to the harm that their offences have caused. Furthermore, while our sentencing rules may not currently include an express reference to the value of equal respect, which sustains our criminal justice system's conception of both fault and wrongdoing, the fact that this dimension of a crime appears to be the most important allows us to avoid having to choose between giving either of the two aspects of harm and culpability the controlling role either within the criminal law or in our sentencing law.¹⁸³

In the final chapter I will explain how we can use our understanding of the relationship between the two dimensions of a crime to organise and structure the final part of the criminal justice process that begins with the legislative decision to forbid and criminalise certain conduct and ends with the sentencing decision to punish offenders for their crimes. I have argued in this section that we do not have to adopt either of the retributive or the utilitarian rationales for punishment to justify our punitive responses to offenders because we can find sufficient justification for these responses within the good life model itself. I have demonstrated that the punitive practices found within our current criminal justice system can be explained and justified as a choice to use the dimension of harm to stand up for our political and moral vision of ourselves as equals living in a community of equals. I have also argued that the choices that we have made not only in the design of our criminal justice system but also in our structure of our civil justice system reveal that we prize the normative dimension of the good life more highly than its factual elements.

Criminal justice, as equal justice, protects our equal vulnerability to suffering harm by conduct that threatens the interests that we share equally because of our equal identities and our equally shared purpose of living good lives together as a community

¹⁸² See section 1.3 of Chapter One discussing the different accounts of the seriousness of a crime.

¹⁸³ See Larry Alexander's introduction to the special 1994 issue of the *Journal of Contemporary Legal Issues* on 'Harm v Culpability: Which Should be the Organizing Principle of the Criminal Law?' in 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1.

of equals. It does this by imposing an equal, reciprocal and universal duty on each and every person within the community of equals and it responds to breaches of that duty by treating equal cases equally and imposing equal punishments upon offenders in all cases. Civil justice on the other hand, as particular, individual justice, protects the particular identities and the specific bilateral relationships that render us vulnerable to harm. It imposes only limited and contingent duties and the justice it provides, which is oriented around compensation for harm, is limited, uncertain, contingent and unequally applied. This form of justice is itself imperfect and unequal because it depends in all cases on the means of the wrongdoers to make amends, and, because we refuse to compromise upon our belief that all persons within our community of equals are entitled to be treated as persons of equal dignity, worth and value, we do not insist upon enforcing this particular harm based form of justice in every case. These differences between the criminal law, which we have chosen to treat as a necessity, and the civil law, which we treat as a luxury, reveal that the two paradigms of justice reflect two different responses to harm and wrongdoing which, when seen within the wider context of the legal system as a whole, confirm that the normative dimension of equal respect, and the two aspects of wrongdoing and fault with which it is associated, are rated as more important than the dimension of harm and its two elements of welfare and autonomy.

This discussion suggests that Nicola Lacey and Andrew Ashworth are correct when they argue that there is an important symbolic aspect to criminal punishment¹⁸⁴ and that Lode Walgrave is not entirely correct when he suggests that our punishment system is neutral about the value system it enforces.¹⁸⁵ In fact, our practice of criminal punishment does more than symbolically proclaim its allegiance to the fundamental norm of doing equal justice: it embodies that special conception of justice within its processes; and it protects our vision of our equal value at the same time as it invokes that same vision to justify and control our responses to those who have failed to recognise and respond to the equal value of others. I have argued that our system of criminal justice is characterised by a special conception of equal justice and I have

¹⁸⁴ Lacey N, *State Punishment: Political Principles and Community Values*, (Routledge, London, 1988) at 184, 200; Ashworth, *Sentencing and Criminal Justice*, above footnote 159 at 344.

¹⁸⁵ Walgrave L, 'Imposing Restoration Instead of Inflicting Pain' in von Hirsch et al (eds), *Restorative Justice and Criminal Justice*, (Hart, Oxford, 2003) 61 at 64.

tried to demonstrate that this unique and fundamental form of justice offers such a powerful justification for the structure and form of our responses both in our criminal law and in our sentencing law that it allows us to reject any of the theories of punishment put forward by utilitarians and retributivists. My analysis suggests that it is possible to solve the problems caused by our inability to agree upon a theory of *ethical value* by focusing on our *equal value* and in the next chapter I will explain how that vision of our equal value can assist us to complete the good life model of our criminal justice decision making process and to resolve the remaining challenges posed by punishment and the problem of harm.

11.5 Conclusion

Part IV began in Chapter Ten with an outline of the good life model of a crime. Chapter Eleven embarked upon a lengthy and ambitious project of testing both the theoretical coherence and the practical explanatory power of this two dimensional equality based model by using the two principles contained within it to analyse the decisions that have been made about the structure and form of our criminal law at each of the three stages of legislation, conviction and sentencing.¹⁸⁶ This chapter aimed not only to explain the role played by the two principles of ‘harm to others’ and ‘respect for the equal value of others’ and to find out which one is seen as the more important, but also to defend our criminal justice practices from charges that they are unprincipled and incoherent. This analysis yielded four main conclusions.

- The two principles are sufficient on their own to explain and justify the broad form and structure of our criminal justice practices at each of the three decision making stages of legislation, conviction and sentencing and they reveal that these practices can be seen as comprising a coherent and principled whole.
- The normative respect based dimension is properly and consistently seen as more important than the factual harm based dimension.
- While the respect principle is the more important of the two, the aspect of harm is a significant and essential part of our decision making process. Both the

¹⁸⁶ Constraints of space have prevented me from analysing our rules of criminal procedure. However, I would suggest that they too reveal a concern for the principle of equal respect, particularly in their insistence that the state must act to equalise the consequences of the accused’s special position of vulnerability and take account of the imbalance of power between the accused and the state.

construction and the application of our rules are dependent upon our assessments of harm and the value of the different harm based interests that are affected or threatened by a person's conduct. Without an understanding of the factual harm based dimension of the good life we cannot give any substance to our laws at any of the stages of legislation, conviction and sentencing. Without an appreciation of the respect based principle we cannot justify the limits imposed on the state's legislative and punitive responses in the criminal law.

- If we accept this vision of the good life as the principled basis for our criminal law, we do not need to adopt either of the utilitarian or the retributive accounts of the purposes of punishment or attempt any of the impossible calculations of harm, culpability or moral wrongfulness that are dictated by those theories.

The first part of the analysis showed that the two principles are sufficient on their own to explain and justify the legislative boundaries of the criminal law. The model's two principles can explain the rationale behind the law of attempts and the reasons why we might be justified in imposing criminal responsibility for certain omissions and failures to act in cases of easy rescue, and they can also assist us to resolve in a consistent and rational fashion many of the most highly contested cases that have troubled us at the boundaries of the criminal law. Because the model supplements the factual harm principle with the normative respect principle it is able to deliver upon the liberal promise in a way that the versions of the harm principle put forward by liberals like John Stuart Mill or Joel Feinberg are unable to do on their own.

This feature also allows us to resist any suggestion that the criminal law should hunt down and punish wrongdoing of every kind or forbid risky conduct of all kinds. It rules out on principled grounds any legislation based on the paternalist punishment of those who would harm themselves and any legislation based on implementing conventional morality or punishing the mere expression of opinions that might give offence to others. It does, however, explain the relevance of conventional morality and our sense of offence within our legislative process and their place as part of the basis upon which we might protect our shared interests in using and enjoying public places provided by the state to all within the community. One of the other benefits of adopting the good life model is that it allows us not only to understand and classify our criminal law and to limit its scope but also to differentiate criminal wrongdoing

that is properly dealt with by the state from the kind of wrongdoing that is more properly dealt with by the civil law and its harm based remedies.¹⁸⁷

The later parts of the analysis, which focused on the defences and sentencing law, confirmed the hypothesis that wherever there is a clash between the normative and the factual dimensions, we properly and consistently favour the normative dimension of equal respect over the factual dimension of harm. The discussion of the defences revealed that within the harm based dimension we do not need to nominate either one of the two aspects of autonomy or welfare as the controlling principle in the legislative and trial stages of the criminal law, because the true controlling principle is not a factual principle based on harm, but the normative principle based on respecting others as persons of equal value. Equally importantly, the discussion showed once more that both the content and the application of our legal rules are dependent on our recognition of the role played by the dimension of harm. It explained the significance of harm's role in the criminal law and emphasised that even though the harm principle is subordinate to the respect principle, it is essential that we appreciate the factual aspects of any given conduct before we can ensure that our laws properly reflect the respect based aspect that defines the special nature of criminal wrongdoing. Crucially, without an appreciation of the factual dimension of harm we cannot give any substance to our laws, because our interpretation of a person's attitude and conduct towards the factual harm based interests of others forms the basis of our assessment that they either have or have not respected others as persons of equal value.

On the other hand, without an appreciation of the role of the normative dimension of the good life, we cannot justify the limits imposed on the state's legislative and punitive responses in the criminal law. The model uses the equal respect principle to control the state's responses to those whose conduct it forbids on the grounds that it represents a failure to respect others as equals. It prevents any legislation that is based on a false assessment of any person's relative value (thereby protecting individuals from being forced by the criminal law to act against their own interests). It also controls the state's punitive conduct by imposing a requirement that punishments must be equally and consistently applied, proportionate, and respectful of the equal dignity, worth and value of each offender both as a person and as an equal member of

¹⁸⁷ This is one of the issues raised by Marshall & Duff, 'Criminalization and Sharing Wrongs' (1998)

11 *Canadian Journal of Law and Jurisprudence* 7, discussed above, text at footnote 21.

the community. This special conception of equal justice therefore protects each citizen twice over: first by justifying laws that are aimed at standing up for our equal entitlement to pursue and enjoy the good life as part of a community of equals; and then by imposing limits on the legislative and punitive responses of the state.

Perhaps one of the most significant conclusions drawn from this chapter is the proposition that the good life model gives us principled grounds for rejecting the theories of ethical value and the purposes of punishment put forward by utilitarians and retributivists and for refusing to adopt any of the rules for responding to harm and wrongdoing that those theories would impose upon us. I have argued that we do not need to agree upon one of these theories of the purpose of punishment if we understand the uniting purpose of the criminal law itself, which is derived from our two dimensional vision of the good life for human beings living together in communities where each person is entitled to be treated as an equal among equals. Because it directs our arguments towards the facts about ourselves and our community and not towards the divisive and incompatible theories of ethics or the implementation of a particular vision of cosmic morality, this equality based approach increases our chances of coming to consensus on the content and structure of the criminal law. This is because we already agree upon a version of political morality that is based upon our vision of our political and social equality. One of the advantages of adopting the good life model is that it does not require us to come to agreement either on a 'concocted' set of community values¹⁸⁸ or upon a theory of ethical value. Furthermore, by focusing our attention on our vision of ourselves as persons of equal value and on the range of factual interests that we share in equal measure as a consequence of our shared identity and equal status as human beings living together in a single political community, it allows us to legislate and apply the criminal law in a less divisive and more rational way.

I have argued that the vision of the good life contained in the two dimensional equality based model is convincing enough to justify most of our current practices without any reliance on other theories. My account of punishment as a choice to use harm and not as a duty to inflict harm allows us to reject the worst elements of both

¹⁸⁸ See Alldridge, 'Making Criminal Law Known' above footnote 54 at 108-111; and Lacey N, 'Principles, Politics and Criminal Justice' in Zedner L & Ashworth A (eds), *The Criminological Foundations of Penal Policy*, (Oxford University Press, 2003) 79 at 100.

the utilitarian and retributive theories while at the same time keeping the best features of our own system intact. We can continue to insist on proportionality and consistency in punishments but we do not have to try to measure either harm, wrongdoing, punishment or its deterrent effects before we can be sure of doing justice. Moreover, because it is based on our assessments of relative value and not on giving each interest or person a particular individual value, we need not adopt a summing approach to measuring and weighing different quantities of harm as part of our criminal justice process at any of its stages of legislation, conviction and sentencing. What we must do above all is to apply the principle of equal justice to limit all of our choices: to declare conduct to be criminal, to convict offenders, and to distribute punishment – or harm – on those offenders in response to the fact that they have failed to treat others as equals.

This chapter has sought to show that all three parts of the criminal justice process appear to be aimed at responding to the existence of the special kind of wrongdoing that is seen as a failure to treat others as equals and not simply at responding to the consequences that flow from that wrongdoing. This is an ambitious and controversial claim,¹⁸⁹ and it must be pointed out that the good life model does not resolve all of our problems within the criminal law. I will return to this issue in the final chapter, however, the discussion in this chapter has suggested that we can make a better start towards understanding our criminal justice practices by focusing on our vision of ourselves (as equals), of our community (as a community of equals) and of the good life for human beings (as comprising the three essential and incommensurable elements of welfare, autonomy and equal respect) than by focusing on the specific harm based interests that the criminal law appears to protect. This is because the primary factor that determines the existence, the shape and the structure of our criminal law is not our recognition of our factual interests, but our recognition of our

¹⁸⁹ Andrew Ashworth argues in *Sentencing and Criminal Justice*, above footnote 159 at 59 and 78 that it is not possible to formulate a meaningful ‘aim of the criminal justice system’ that ‘applies at every stage’, and warns that it would be extravagant to assert that ‘there is a settled core of principles and policies which can be drawn together and put forward as a coherent group.’ See also the reference to the views of John Gardner in footnote 191. Similar views have been expressed in relation to our system of tort law by Peter Cane in *The Anatomy of Tort Law* above footnote 145 at 21: ‘the idea that we might find a single overarching principle, or even a very few general principles which would explain any large body of legal rules and principles is unattractive.’

common desire to be respected by others as an equal living within a community of equals. It is the special meaning of the conduct and the special message of disrespect that we interpret from the fact of that conduct – and not its actual consequences – that is the true focus of the criminal law. If we start with the interests themselves and not with the reason why we want to respond to those who have threatened those interests, we will be unable to see any clear way of distinguishing between the conduct that we want to punish as criminal wrongdoing and the other kinds of conduct that we want to leave to the civil justice system and its harm based remedies.

The enduring difficulty for those who seek to understand our criminal justice system is to find an account of our practices that can not only identify what is to count as criminal wrongdoing and help us to categorise and grade individual examples of wrongdoing but can at the same time explain what is to count as a proper response to such wrongdoing.¹⁹⁰ This chapter has attempted to answer these questions by focusing on our two dimensional vision of what counts as a good life for human beings and what counts as good conduct by human beings and it revealed a special conception of criminal justice as equal justice. This vision of equal justice that lies at the heart of the good life model serves three important functions. It unites the three stages of the criminal justice process into a coherent whole. It distinguishes the criminal law from our system of civil law and frees it from the dictates of conventional morality and the divisive theories of right and wrong put forward by utilitarians and retributivists. And it explains and accounts for the role of the state in the criminal justice system, while at the same time imposing principled limits on the state's legislative and punitive responses within that system.

The good life model, with its recognition of the proper relationship between the harm principle and the respect principle, therefore allows us to place all of the different crimes, the defences to those crimes, and our responses to those who have been convicted of committing those crimes onto a single map.¹⁹¹ I must emphasise

¹⁹⁰ Ashworth, *Principles of Criminal Law*, above footnote 58 at 21.

¹⁹¹ John Gardner, in 'Crime: In Proportion and in Perspective' in Ashworth A & Wasik M (eds), *Fundamentals of Sentencing Theory*, (Clarendon Press, Oxford, 1998) 31 at 41-48, suggests that the idea that all crimes are covered by 'a single moral map' has very little to recommend it. Andrew Ashworth, in 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225 at 226, observes that there appears to be 'no single test or set of related tests' that can account for the substantive content of our current criminal laws.

again that this is not an historical account of the origins of our criminal justice system. Rather, it offers us a rational and defensible account of our practices that justifies our continued support for the system in our own times. It has offered us an account of the reasons behind our basic decision making process that allow us to portray our current system as a coherent and consistent set of rules and to use the sense that we have found within those practices to improve those rules. In the final chapter I will explore the way that we can use this two dimensional model of a crime as a basis for the construction of a model of the sentencing decision and will suggest how we might build upon these insights to evaluate the seriousness of criminal offences and give a proper weight to the three important aspects of harm, wrongdoing and fault as we sentence each individual offender. One of the virtues of the good life model is the fact that it provides us with a complete vocabulary for reading and judging the conduct of others by giving us a language, not only of harms,¹⁹² but of wrongdoing and fault as well, and in the concluding chapter of this thesis I will show how this language – and the informing vision of ourselves as equals that gives moral and political authority to that language – allows us to do equal justice in the criminal law.

¹⁹² Robin West calls for the law to develop a 'language of harms' in 'The Other Utilitarians' in Bix B (ed), *Analyzing Law: New Essays in Legal Theory*, (Clarendon Press, Oxford, 1998) 197 at 220.

Chapter 12

Conclusion:

Punishment and the Problem of Harm

This thesis aimed to present an account of the concept of harm that could explain its role at each of the three stages of legislation, conviction and sentencing and at the same time could ensure that the decisions that we make within the criminal justice decision making process can be structured around a single, coherent and consistently applied scheme of values. The problem of harm raised three main issues: the first issue rose directly from our disagreements over the nature of harm itself; the second from our failure to agree on the importance of harm's role in the criminal law; and the third from our perceived need to impose principled limits on harm's relevance to an offender's sentence of punishment.

In order to resolve our disagreements about harm's role in our criminal justice system I suggested that, rather than beginning with the traditional, but divisive, discourse over the purposes of punishment, it was important to concentrate instead on the things that unite us, like our common language, our common values, our common nature as human beings, our common vision of the good life and our common commitment to justice. Consequently, I focused my analysis on:

- The meaning of the concepts of harm, wrongdoing, fault and crime;
- The purpose of the criminal law and the nature of our community's vision of the good life which it appears to embody and protect;
- The practices that characterise our criminal justice decision making process; and
- The vision of justice and the principles that animate those practices.

My aim in searching for the sense that is contained within our current practices was to increase our chances of arriving at some form of consensus on harm's role in the criminal justice decision making process. I suggested that once we could see our practices more clearly, we would be able to defend our system from charges that it is irrational, incoherent and unprincipled, resist the vengeful and punitive proposals made by some retributivists (who seek to impose greater punishments on offenders

based on all the harm that they have caused), counter the calls for a complete transformation of our criminal justice system that are currently made by proponents of restorative justice, and give ourselves good reasons for rejecting the approaches to harm urged upon us by retributivists and utilitarians.

This final chapter has two aims. The first is to complete the thesis by drawing together the conclusions that I have made about harm's role in our criminal justice decision making process. The second is to suggest how these conclusions might provide an illuminating set of answers to six of the questions that philosophers have traditionally asked when discussing the question of criminal punishment. Section 12.1 will review the conclusions from Parts I and II about the meaning and nature of the concept of harm. Section 12.2 will give a brief summary of the investigation into harm's significance in the criminal law that was presented in Parts III and IV and section 12.3 will collect together the various suggestions that I have made throughout the thesis about harm's role in sentencing and explain how they can be combined to construct a coherent and principled set of sentencing rules.

This section on harm's role in sentencing will outline the recommendations that I have made about the different roles that the three concepts of wrongdoing, harm and fault should play in our assessment of the seriousness of a crime and summarise my approach to the problems that confront our sentencing judges when they must consider the issue of harm. It will also present three respect based rules that I suggest should limit the extent to which the harm that results from a crime can be taken into account in sentencing. The first is a rule of remoteness that uses the two concepts of wrongdoing and fault to construct a two limbed rule that can control the categories of harm that may be relevant to sentence. This rule attempts to assess and respond to the extent to which an offender's conduct constitutes a failure of respect. The second rule, which is based on a principle of absolute fault, relates to the factual basis for a sentence. This rule of procedure completely precludes the state from taking into account any harm that has not been included in the charges made by the state against the offender or any adverse fact relating to harm that the state has not properly proved. The third rule relates to the quantum of sentence and it is based upon a principle of comparative or relative fault. It provides that in cases where the state is itself partly responsible for the harm resulting from the crime, it should be precluded from exacting the full measure of punishment from the offender for that harm.

My analysis of harm's role in the criminal justice decision making process was based on constructing a model of a crime that reflects our community's conception of the good life for human beings. This two dimensional model not only helped us to answer our questions about harm; it also revealed the special nature of our conception of criminal justice, illuminated the underlying structure of our system of criminal law and pointed us towards a morally and politically acceptable justification for that system. Consequently, I want to conclude the thesis in section 12.4 by reflecting upon a number of questions about the nature and purpose of criminal punishment and the role of the state in the criminal justice system that I deliberately chose to avoid at the beginning of my investigation. This final section of the thesis will present the answers that the good life model's account of criminal justice – as equal justice – gives to the following six questions that are traditionally asked by those who think about the criminal law and the problem of punishment:

- What is the general justifying aim of the criminal justice system and what is the role of the state within that system?
- What conduct may the state rightly make criminal?
- What conduct is more properly dealt with by the civil law?
- Who may rightly be convicted and punished for breaches of the criminal law?
- Why punish?
- What are the limits on criminal punishment?

12.1 The nature of harm

The first half of this thesis analysed the ordinary meaning of the four concepts of harm, wrongdoing, fault and crime and aimed to explain the relationships between them. I concluded from this investigation into our common language and our common understanding of these concepts that:

- Harm is a purely factual concept that refers to the effects of an event that make something or someone worse off than they were before the event.
[section 2.2, Chapter Two]
- Harm is not a normative concept, however, its proximity in the criminal law to the normative concepts of wrongdoing and fault does raise complex issues of evaluation.
[section 2.4, Chapter Two]

- There is no special kind of ‘criminal’ or ‘penal’ harm.
[section 6.6, Chapter Six]
- The test for causing harm should be restricted to a purely factual test that inquires into whether a person’s conduct has made any other person worse off, either in respect of their actual state, their legitimate expectations, or their competitive position relative to others. The question of attributing criminal responsibility for conduct that causes harm should be settled by reference to the concept of fault.
[section 2.2, Chapter Two; section 4.2, Chapter Four]
- Wrongdoing is a normative, but empty, concept that refers to conduct that deviates from a rule, norm or standard of conduct that is thought to be right.
[section 3.2, Chapter Three]
- Fault is a normative, but empty, concept that refers to the fact that a person’s individual responses to their circumstances are seen to have deviated from those that are thought to be right.
[section 3.3, Chapter Three]
- In its ordinary sense, the concept of a crime is an open concept. It is a special kind of legal wrongdoing, where it is thought to be right that the state should respond to offenders by imposing hard treatment upon them.
[section 5.1, Chapter Five]
- The very notion of a crime as a special kind of wrongdoing implies that the normative or moral aspects of the forbidden conduct should take precedence over the factual harm based aspects.
[section 7.6, Chapter Seven]
- The seriousness of a crime should be assessed by reference to the three separate aspects of wrongdoing, harm and fault. None of these three concepts needs to be defined in terms of the others, and the only composite concept that should remain is the unavoidably complex concept of a crime itself.
[section 4.3, Chapter Four; section 7.6, Chapter Seven]

Significance

I argued in Chapter Six that we should refuse to adopt any of the extended normative definitions of harm that have been put forward by philosophers and legal

academics and suggested that lawyers, judges and theorists should take care to use these words in their ordinary sense in order to avoid the confusion caused when we adopt inscrutable private meanings for terms that have well known natural meanings. Apart from conferring the benefits of simplicity, clarity and easy communication, however, the use of the ordinary meaning of these basic terms will also allow us to improve not only the clarity of our analysis of our current criminal justice decision making process but also our ability to construct clear and unambiguous rules to guide those decisions. This second benefit arises from the observation that the everyday definitions of each of the three concepts of wrongdoing, harm and fault do not include any necessary reference to any of the others. The independence and separate *nature* of these concepts therefore allows us to give each of these concepts a clearly defined and separate *function* when we construct the rules that both guide our decisions within our criminal and sentencing laws and limit the scope of the state's power to punish those whose conduct is characterised as criminal. My recognition of this feature also made it possible to construct the good life model of a crime by making links between the three aspects of a crime, which I argued are wrongdoing harm and fault, and the three elements of the good life that we value most, which I suggested in Chapter Eight are our welfare, our autonomy and our desire to be respected by others as an equal.

12.2 Harm's role in the criminal law

My examination of harm's significance in the criminal law aimed to present an account of the concept of harm that could explain its role at each of the three stages of legislation, conviction and sentencing. The analysis produced by the good life model in Part IV revealed that the concept of harm – and the two elements of welfare and autonomy with which it is associated – plays a crucial role in the criminal law. My investigations into the purpose of our practices and the principles contained within them showed that our system of criminal justice is worthy of its name and revealed that our criminal justice process is a meaningful, rational, purposive and principled practice that is dominated by the normative principle of equal respect and which is given form and substance by our appreciation of the dimension of harm. I concluded that our understanding of the factual concept of harm assists us, not only to define and to apply the criminal law at each one of the three most important decision making stages of the criminal justice process, but also to give effect to the particular vision of the good life which our community's system of criminal law appears to protect.

The links that were made in Chapters Nine and Ten between the three good life elements of welfare, autonomy and respect and the three aspects of a crime allowed us to give greater factual content to the empty concepts of crime, wrongdoing and fault and led to the following general conclusions:

- The purpose of the state is to protect and maintain the conditions under which we can pursue and enjoy the good life together as a community of equals.
Through the criminal law, the state stands up for each person's equal entitlement to pursue and enjoy a good life within a good community and gives effect to our conception of criminal justice as equal justice.
[section 9.6, Chapter Nine; section 10.5, Chapter Ten; section 11.5, Chapter Eleven]
- The good life contains both normative and factual dimensions and both of those dimensions are reflected into the criminal law.
The factual harm based dimension includes the two elements of welfare and autonomy, and the normative respect based dimension reflects the value that we place on being treated by others as an equal.
[sections 9.5 and 9.6, Chapter Nine; section 10.5, Chapter Ten]
- The three important aspects of a crime (ie, wrongdoing, harm and fault) can be linked with the two dimensions of the good life: the factual concept of harm is connected to the good life elements of welfare and autonomy; the normative concepts of wrongdoing and fault are connected to the element of equal respect.
[section 9.5, Chapter Nine]
- Criminal wrongdoing can be defined as conduct that is interpreted as deviating from the primary norm requiring each person to respect others and treat them as persons (or beings) of equal dignity, worth and value.
[section 9.6, Chapter Nine; section 10.4, Chapter Ten]
- Criminal fault can be defined as a personal failure to recognise and respond properly to the equal value of others. An assessment of fault is based on the offender's false evaluation of his or her own relative worth which we infer from their expressed attitudes or from the fact of their conduct itself.
[section 9.6, Chapter Nine; section 10.4, Chapter Ten]
- In our community a crime is conduct that is seen as a deviation from the primary norm that requires each person to respect others by treating them as

equals. We can define a crime as conduct that evidences a failure to respect the equal value of others (the normative limb) and their equal entitlement to pursue and enjoy their welfare and exercise their autonomy within the boundaries provided for by the state (the factual limb).

[section 9.6, Chapter Nine]

- Our current criminal justice practices appear to contain a special conception of justice that requires equal treatment of equals by equals.

[section 10.5, Chapter Ten]

The analysis produced by the good life model showed that our criminal law is marked out, not by a special interpretation of harm, but by a distinctive account of the notions of wrongdoing and fault that is derived from our vision of ourselves as persons of equal dignity, worth and value, and by a special conception of justice that requires equal treatment of equals by equals. Two of the most significant features of the model are its focus on the concept of equality, and its addition of the notion of equal respect to the two familiar and most commonly cited elements of autonomy and welfare. The benefit of expanding our focus by including the normative and relational element of respect is that it allows us to resolve the problems of incommensurability that we encounter if we base our analysis only on the two factual harm based aspects of welfare and autonomy. This focus on the unambiguous and uncontested concept of equality allows us to locate not only the factual basis for our criminal laws (in our common identity as animals, human beings, and members of the community), but also, and equally importantly, to identify their moral and political justification as well.

Unlike the idea of social equality, which is a divisive and contested concept, the non-social, almost quantitative, notion of equality that is used in the good life model allows us to base our rules on an easily recognised and easily applied concept that is much more useful than the ubiquitous and far-reaching notion of harm and is much less divisive than relying on the idiosyncratic conceptions of wrongdoing and fault that we use in everyday life. The advantage of adopting the good life analysis is that it forces us at the outset to consider the factual categories of equality that we share. By contrast, other approaches, for example, those that reflect conventional morality, can allow us to adopt an uncritical and inconsistent approach to the criminal law, whereas those based purely on utilitarian or retributive theories force us into responses that are not only unpalatable and impossible to implement, but difficult to justify.

Chapter Eleven tested the application of the good life model and the two principles of ‘harm to others’ and ‘respect for the equal value of others’ at each of the three stages of legislation, conviction and sentencing, and the conclusions from this chapter about harm’s significance in the criminal justice decision making process follow:

- At the legislative stage, our appreciation of the nature of the factual harm based interests that we all share equally by reason of our common nature as human beings and as animals and our common identity as members of the community enables us to identify the content of the criminal law, classify our laws, and differentiate each law from the others.

To satisfy the ‘harm principle’ it must be shown that the conduct threatens or risks some harm *either* to the equally shared welfare interests *or* to the equally shared autonomy interests of another.

[section 11.2, Chapter Eleven]

- At the trial stage, our reading of the attitude that an accused has displayed towards the harm based interests of others in welfare and autonomy and the false claim of relative value that we read from their conduct and attitudes assists us to decide whether those whose conduct appears to have breached the defining norm of equal respect are at fault and ought to be convicted.

When considering the defences, the presumption of fault can be rebutted only by showing that the accused has treated the other person as an equal and, in the case of the defence of consent, has respected *both* the welfare *and* the autonomy interests of the other person.

[section 11.3, Chapter Eleven]

- At the sentencing stage, when we must choose the punishments to impose upon offenders who have been convicted of breaching the criminal law, it appears that our choice to use hard treatment – or harm itself – as the form of our responses to those who have breached the fundamental norm of equal respect plays an important role in enabling us to stand up for our defining vision of ourselves as equals and of our community as a community of equals.

[section 11.4, Chapter Eleven]

The investigation in Chapter Eleven was designed not simply to test the explanatory power of the good life model but primarily to assess the priority of value that we have allocated to the two separate dimensions of a crime. It revealed that:

- An appreciation of harm is necessary at all stages of the criminal justice process; without this understanding of the factual harm based aspects of the good life we cannot give substance to the empty normative concepts of crime, wrongdoing and fault, offer morally or politically acceptable reasons for our decisions, or differentiate the special judgements that we make in the criminal law from those that we make in everyday life.
[section 10.5, Chapter Ten; section 11.5, Chapter Eleven]
- Within the criminal justice decision making process, we have consistently privileged the normative respect based aspects of wrongdoing and fault over the factual aspect of harm at each of the stages of legislation, conviction and sentencing.
[section 11.5, Chapter Eleven]

Significance

The investigation in Chapter Eleven revealed that while harm plays a crucial role at every point in the criminal justice decision making process, harm's role is always secondary to the primary role played by the normative dimension of respect and the concepts of wrongdoing and fault that are associated with this dimension of a crime. So, while I argued that both the harm principle and the equal respect principle are essential to our legislative decisions, I also concluded that it is the normative dimension of respect and not the factual dimension of harm that unifies our criminal law, limits its scope, and distinguishes our criminal law from other kinds of legal wrongdoing. The analysis of the legislative stage did show, however, that with one exception (in the case of our taboo about misconduct with human corpses), we can use the two principles of 'harm to others' and 'equal respect for others' contained in the good life model to explain and justify and, in some cases, to reform our legislative decisions without the need to adopt any other tests or categories.¹ The discussion of the contested cases not only showed that the good life model offers us a principled and relatively straightforward way to resolve our current doubts about the content of

¹ I did suggest, however, that we should supplement our criminal law with a second category of legal wrongdoing which allows the state to bring an action against an individual as a 'personal' grievance rather like a civil wrong. This category of 'quasi-personal' action can usefully deal with those kinds of conduct (like the failure to wear seatbelts and helmets) that are legitimate concerns of the state, but which we feel should not necessarily attract the condemnation and censure of the criminal law.

the criminal law, but it also demonstrated that it can deliver upon the liberal promise in a way that the harm principle (either in its earlier factual version put forward by John Stuart Mill or in its later extended normative formulation suggested by Joel Feinberg) cannot do on its own. I argued that the good life model's special conception of equal justice and its insistence on the satisfaction of the two legislative principles protects each citizen from harm twice over: first by justifying laws that are aimed at standing up for our equal entitlement to pursue and enjoy both our welfare and our autonomy; and then by imposing limits on the legislative and punitive responses of the state that might themselves inflict harm upon citizens.

The analysis of the defences in Chapter Eleven showed that the critical factor in our decisions to convict is not our assessment of the harm that is intended or actually caused by the accused, but our conclusion as to whether or not an accused has complied with principle of equal respect. The good life model revealed that the criminal law is not primarily concerned with responding to the fact of harm-doing – or even to the fact of a rights violation – but with responding directly and only to people whose conduct has exhibited the special kind of criminal fault that represents a failure of respect. The discussion of the defences also showed that within the harm based dimension we do not need to choose either one of the two aspects of autonomy or welfare as the controlling principle, because the true controlling principle is not a factual principle based on harm, but the normative principle based on respecting others as persons of equal value.

At the third stage of the process where we punish offenders, my examination of the broad features of our sentencing system suggested that our responses appear to be determined, not by our desire to respond to the harmful aftermath of the criminal conduct, but by our primary desire to mark out and respond to the single fact that the offender's conduct has deviated from this special, fundamental and defining norm which requires each person to respect others and to treat them as persons of equal dignity, worth and value. These conclusions about harm's overall role in the criminal justice system also identified the principled basis upon which we should construct our rules for taking harm into account when sentencing offenders. They suggest that our distribution of hard treatment – or harm – in response to criminal wrongdoing should be based upon the recognition that our criminal law appears to embody a fundamental and unique conception of justice that requires equal treatment of equals. I also argued that this conception of equal justice, when combined with the requirements of justice

in the distribution of punishment, rules out any need to rely upon implementing conventional morality, or to adopt upon any theories of retributive justice, corrective justice or any utilitarian account of the criminal law. Equally importantly, it also rules out any need to follow any of the prescriptions for measuring harm that our acceptance of these theories would impose upon us when we sentence offenders. I argued in Chapter Eleven that once we see criminal punishment as a choice to stand up for the single foundational norm of equal respect that defines us as a community of equals, and not as a moral obligation forced upon us by a utilitarian or deontological account of right and wrong, we are liberated not only from the duty to impose the sometimes draconian punishments mandated by these theories but also from having to attempt the impossible calculations of harm that they would impose upon us.

Finally, the investigation of our practices suggested that we should also see the fundamental notion of proportionality in a different light. I argued that we should reject the notion of proportionality as a 'cosmic' or absolute concept and see it as an essentially comparative notion that flows inevitably from our double duty to do equal justice and to treat like cases alike and different cases differently. Once we see the problem of desert, proportionality and punishment, not as a matter of corrective or retributive justice, but as a matter of distributive justice controlled by the principle that equals must be treated equally and unequals unequally, then our sentencing task becomes much easier. The first task is to identify the purpose of the state's distribution of the burden of punishment and then, using that purpose as our guide, our second task is to identify the relevant categories of similarity and difference that exist between offenders.

I concluded at the end of my lengthy examination of our criminal justice decision making process that our sentencing law should reflect the conception of justice that is embodied within our wider criminal justice system. I suggested that the common law of sentencing should therefore reflect a commitment to equal justice, proportionality and comparative (as opposed to cosmic) desert, and should also mirror the relative priority of value that we have given to the principle of equal respect (and the normative concepts of wrongdoing and fault) over the harm principle (and the elements of welfare and autonomy). In the following section I will apply these insights to the sentencing decision and explain how the good life model can provide us with the answers to the two questions about sentencing and the problem of harm that I raised in the Introduction to this thesis.

12.3 Harm's role in sentencing law

This thesis has developed four different strands of an argument that was designed, in part, to answer two questions about harm's role in our sentencing law. These questions were:

- Should the harm that results from an offender's crime be taken into account as a relevant factor in sentencing?
- If harm is relevant, what limits should we place upon the extent to which the state can track the harmful effects of a crime when punishing offenders?

I sought to answer these questions by conducting four interlinked investigations into the meaning of the key terms used in our criminal justice system, the apparent purpose of that system, the practices contained within that system, and the special conception of justice and the principles that animate those practices. The first strand of my argument was derived from my investigation into the definitions of the key terms used in the debates over the moral limits of the criminal law. This investigation focused on our common language and the common meaning that we give to these concepts. I concluded that our ordinary understanding of the normative concept of a crime, as a special kind of wrongdoing, itself suggests that when we construct our sentencing rules, we should give precedence to the normative or moral aspects of the forbidden conduct over its factual harm based aspects. However, this investigation into the meaning of crime and wrongdoing did not, on its own, allow us to decide whether the harm done by a crime should be relevant to an offender's sentence and consequently, I turned to consider the purpose of our system of criminal law.

The second investigation into the purpose of our criminal justice system focused on our common nature, our common desire to share our lives together and our common vision of the elements of a good life and the nature of a good community. This investigation yielded the second strand of the argument; it concluded that since an assessment of both the normative and the factual dimensions of the good life was essential to our task of giving content to our criminal laws, then both of those dimensions should be relevant to sentencing. I argued in section 10.5 of Chapter Ten, that if the purpose of the criminal law is to protect not just our vision of the ideal lives that we hope to lead, but to secure the actual lives that we do lead, then we must take account of both the normative and the factual dimensions of the conduct that we have chosen to forbid. I concluded that the concept of harm plays a doubly significant role

in our decisions. Harm is initially important because it is indispensable to our ability to realise our understanding of a crime as conduct that is seen as a failure to do equal justice to others because it threatens their equally shared harm based interests. Furthermore, once this primary foundation has been laid, actual harm (as opposed to the threat of harm) is also independently significant in its own right because our welfare and autonomy are two of the essential elements of the good life that the state protects through those criminal laws.

While the investigation into the purpose of our criminal justice system allowed us to answer the first of our questions, it did not provide any answer to the second. This question pushed the investigation further and required us to consider which of the two dimensions of a crime should take precedence when we must set the limits on the state's entitlement to take harm into account when sentencing offenders. The third investigation into our practice itself was therefore based on the premise that the criminal justice system, as a rational system of rules, should aim for a consistent treatment of harm at each stage of the decision making process and the idea that our sentencing rules should conform with the rationale for those that we have used in the two preceding stages of the process. Consequently, this investigation searched for the values that account for the decisions that we have made at each of the three crucial decision making stages within that process and it revealed that at each stage we have consistently privileged the normative dimensions of the conduct over its factual harm based aspects. I concluded that we should use the normative dimension of respect and the two concepts of wrongdoing and fault that are associated with that normative dimension to control the extent to which the state should take the harm done by a crime into account when sentencing offenders. However, while accepting this suggestion would ensure that our sentencing decisions would be consistent with those taken at the earlier stages, this account of the values that lie behind them did not necessarily provide us with any morally compelling reasons for adopting this approach, because in the criminal law, rationality, on its own, is not enough.

The final investigation into the principles of justice found within our system was necessitated by the fact that our criminal justice system does not purport only to be a rational, consistent and coherent system of rules. Rather, it purports to offer moral guidelines that should govern each person's conduct and it also aims to do justice to all who live under the protection of the state. The claim that the state is entitled to do justice to those who have been convicted of criminal wrongdoing is a claim that must

be justified and supported by morally and politically acceptable reasons and I searched for those reasons by looking for the conception of justice and the principles that are contained in our current criminal justice practices. I concluded that both our criminal law and our sentencing law embody a powerful conception of equal justice that is based on our vision of ourselves as moral and political equals who share an equal entitlement to pursue and enjoy the good life together and to be respected by others and treated as an equal. I suggested that our criminal law reflects the two different connotations of the 'good' life; it identifies not only the things that we think are factually good for us but also the kind of behaviour that we view as morally good conduct. This investigation also revealed that our decisions to punish offenders by imposing hard treatment upon them are supported by the two guiding principles of 'harm to others' and 'equal respect for others' and our deeply held emotional, moral and intellectual commitment to the principle of equal justice. I suggested that our common commitment to this vision of ourselves as equals and of our community as a community of equals provides the moral and the political heart of our criminal law and I argued that our notion of criminal justice as equal justice must therefore control our punitive responses to those who have breached those laws.

These conclusions, that our laws should not only be consistently applied and rationally structured around the concepts of wrongdoing, harm and fault, but should also be based upon morally and politically acceptable principles and a conception of equal justice that privileges the normative over the factual, provide the final strands in the argument and allow us to answer the two questions about harm's role in sentencing law as follows.

1. Should harm be a relevant consideration at all when sentencing?

Yes, as a matter of purpose and principle, harm should be taken into account as part of the sentencing process.

2. What moral limits should we impose on the extent to which the state may take harm into account when sentencing offenders?

As a matter of meaning, as a matter of rationality, as a matter of principle and as a matter of justice, the extent to which the state may take harm into account should be limited by the normative respect based concepts of wrongdoing and fault.

In the remaining part of this section I will set out the solutions that I have suggested might resolve the problem of harm's role in the sentencing decision. I argued in Parts I and II that the sentences of punishment that we impose upon

offenders should reflect our assessments of the seriousness of the three distinct aspects of wrongdoing, harm and fault that dominate our responses to crimes and the offenders who commit them. Our evaluation of each of these three components is made relatively straightforward because of the link that we can make between each of them and the value that we place on the three good life elements of welfare, autonomy and respect. So, our assessments of harm will be informed by the relative value that we place on our various interests in welfare and autonomy, which I described in detail in sections 9.2 and 9.3 of Chapter Nine; and our assessments of wrongdoing and fault will be informed by the value that we place on being respected by others as an equal, which I discussed at length in section 9.4 of Chapter Nine and 10.4 of Chapter Ten.

Beyond their independent relevance to our judgment of the seriousness of a crime, the concepts of wrongdoing and fault play another important role because they can be used to construct the rules that limit the extent to which we can fairly take the harm done by a crime into account. As I explained in section 7.5 of Chapter Seven and section 9.6 of Chapter Nine, one of the chief problems caused by the concept of harm is the fact that the adverse effects of a crime can ripple out in all directions and can theoretically continue forever. However, although as a purely factual matter it is relatively easy to identify and track the harm done by a crime by applying the test that asks whether anyone has been made worse off by the crime, the question of moral limits is one that requires us to look beyond the meaning of harm itself and to consider the normative concepts of crime, wrongdoing and fault. As we can see from Table 12.1 below, which sets out the approach to sentencing suggested by the good life model, the two concepts of wrongdoing and fault are therefore important twice over; first, as independent factors in their own right when we are evaluating the seriousness of a crime, and again when we must justify and give principled structure to our rules for dealing with the problem of harm.

The assessment of wrongdoing requires us to evaluate the social meaning of the conduct itself and to consider the nature, purpose and importance of the particular law that has been violated. As we know from Chapter Eleven, this assessment relies in part upon our appreciation of the factual interests that constitute the protected objects of each law, but, as my discussion of the crime of incest in section 3.2 in Chapter Three illustrated, the social meaning of a person's conduct is nevertheless conceptually distinct from the adverse or harmful effects which may flow from the conduct itself, which we object to on the grounds that it is a deviation from a

normative standard thought to be right. As I explained in Chapter Three and in section 7.5 of Chapter Seven, the negative concept of wrongdoing implies the existence of a corresponding positive notion of something thought to be good, and, once any particular norm of conduct has been made a part of the criminal law by legislation, we can, as a matter of practical interpretation, identify the immediate purpose or protected object of that law. As I shall explain shortly, this feature of the concept of wrongdoing allows us to set an initial limit on the categories of harm that may be relevant to sentencing by applying a test based on the 'scope of the wrong'.

The second component, fault, focuses on the offenders themselves and their personal failure, in the circumstances, to respond properly to others. In Chapter Ten I explained that this fault component can take a specific, personal form or a more diffuse, impersonal form depending on the kind of crime that the offender has committed. I suggested that we tend to evaluate the form of specific fault that characterises the crimes of common humanity as being more blameworthy than the more diffuse form of fault that characterises the crimes of common community. In section 10.4, I gave a number of examples of the different claims of relative value that we can read both from an offender's conduct and from the attitudes to others that have animated and accompanied that conduct. I suggested that our reading of these value claims, which contrast the object of the offender's desire with the importance that we place on the interests affected by the offender's conduct, can assist us to evaluate the degree of fault. As we saw in section 11.3 in Chapter Eleven, which discussed the defences, the assessment of fault is also affected by our appraisal of the offender's state of mind, their intentions, their capacity to recognise and respond to the value of others, and the circumstances surrounding the commission of their crimes.

In sections 2.2 and 2.3 of Chapter Two and section 4.2 of Chapter Four, I suggested that our assessments of fault can assist us in deciding upon the fair attribution of responsibility for harmful wrongdoing and in section 11.3 of Chapter Eleven I explained how a *prima facie* inference of fault based on the fact that a person's conduct has harmed another can be rebutted by showing that, despite appearances, it was not actually animated by a false assessment of relative worth. In this chapter I concluded that we should give the normative concept of fault a similar controlling function in sentencing and that we should use it to justify extending the categories of harm that can be taken into account after we have set the initial limit of remoteness using the 'scope of the wrong' test.

TABLE 12.1 ASSESSING THE SERIOUSNESS OF A CRIME

WRONGDOING The social meaning of the conduct	FAULT The offender's personal responses to others	HARM The adverse effects of the offender's conduct
<p>DEFINITION</p> <p>Conduct in breach of the primary norm requiring each person to respect the entitlement of:</p> <ul style="list-style-type: none">• other human beings,• other members of the community, and• other animals <p>to be treated as persons or beings of equal dignity, worth and value.</p> <p>FOCUS</p> <ul style="list-style-type: none">• The nature, purpose and importance of the particular rule that has been violated; and• The social meaning of the conduct itself. <p>Note: this assessment of meaning and purpose relies in part on an appreciation of the factual interests that are the subject of the law.</p> <p>ROLE</p> <ul style="list-style-type: none">• Independently significant as a factor in its own right.• Provides part of the justification for the limits imposed on the extent to which the state may track the harm done by the offender: <p>a) The 'scope of the wrong' test provides the first objective (containing) limb of the remoteness rule that limits the categories of harm.</p>	<p>DEFINITION</p> <p>The offender's personal failure to respond properly, in the circumstances, to the equal value of others.</p> <p>Fault can be:</p> <ul style="list-style-type: none">• specific and personal in cases of crimes of common humanity, or• diffuse and impersonal in cases of crimes of common community. <p>FOCUS</p> <ul style="list-style-type: none">• The offender's attitude to the relative value of others (our reading of the value claim they have made);• The offender's state of mind and capacity; and• The circumstances surrounding the offence, including the involvement of any other persons (both natural persons and the state). <p>ROLE</p> <ul style="list-style-type: none">• Independently significant as a factor in its own right.• Provides part of the justification for the limits imposed on the extent to which the state may track the harm done by the offender: <p>a) Fault provides the second subjective (extending) limb of the remoteness rule.</p>	<p>DEFINITION</p> <p>Setbacks to or adverse effects on the interests of others in:</p> <ul style="list-style-type: none">• existence itself;• pursuing and enjoying their welfare and benefiting from community facilities, services and resources;• exercising their capacity for personal and political autonomy; <p>FOCUS</p> <ul style="list-style-type: none">• At the legislative stage setting the penalty range: the nature and importance of interests threatened by the conduct, considered in the abstract sense.• At the sentencing stage: the extent of the actual adverse effects resulting from the offender's particular criminal conduct. <p>ROLE</p> <ul style="list-style-type: none">• Independently significant as a factor in its own right.• However, its relevance is subject to limits provided by the normative concepts of wrongdoing and fault. There are three respect based limiting rules: <p>a) The two-limbed rule of remoteness;</p> <p>b) The fact finding rules based on absolute fault;</p> <p>c) The rule of proportionate fault that affects the quantum of punishment.</p>

Harm is the third component of the seriousness of a crime. As we saw in Chapters Ten and Eleven, our understanding of the full range of the factual harm based elements of welfare and autonomy is the key to distinguishing and classifying our criminal laws. Consequently, our assessment of the nature, importance and degree of harm that has flowed from the offender's crimes is one of the most important aspects of the sentencing decision. As I explained in Part IV, this follows for two reasons: first, because our aim in the criminal law is not just to stand up for our vision of the ideal lives that we hope to lead, but also to protect the actual lives that we do lead; and secondly, because our duty to do equal justice to offenders requires us to take into account all of the relevant differences between them – and one of those differences is the harm that they have threatened or caused. As I explained in section 7.5 of Chapter Seven, harm raises two issues. The first is the factual issue of identifying the harm that flows from a crime. The second is the moral question of how we should properly limit our responses to that harm. Resolving the factual issue involves two sub-steps: we must identify and evaluate the importance of the particular interests that have been threatened by the offender's conduct; and then we must assess the degree to which those interests have been affected for the worse as a result of the crime.

The task of identification requires us to apply the factual 'worse off' test, which I developed in section 2.2 of Chapter Two and illustrated with examples in section 2.3. This test requires the judge to consider the ways in which any person or any group of persons has been made worse off in respect of either their actual state, their legitimate expectations, or their competitive position relative to others. As I demonstrated in section 10.3 of Chapter Ten, which listed the factual interests protected by some of the crimes of common humanity and crimes of common community, a crime can affect both our welfare and our autonomy interests for the worse, and, when we assess the harmful effects of a crime, we need to evaluate the importance of those relevant interests and the degree to which they have been affected by the offender's conduct. As I have argued, in section 11.3 of Chapter Eleven and elsewhere,² sentencing is better conceived of as a matter of evaluation, not of measurement and transposition,

² Davis J, 'The Science of Sentencing: Measurement Theory and von Hirsch's New Scales of Punishment' in Tata C & Hutton N (eds), *Sentencing and Society: International Perspectives*, (Ashgate, Aldershot, 2002) 329. A similar account of the process was recently given by Gleeson CJ, McHugh, Gummow and Hayne JJ in the High Court of Australia in *Weininger v The Queen* [2003] HCA 14 (2 April 2003) at [24].

and so at this point we should use the units of fines, community service, imprisonment, etc, to calibrate the gradations in our responses.³

The main difficulty that sentencers face is not the task of identifying or evaluating the harm that is done by a crime, but the task of justifying the limits on the extent to which we should fairly track those harms and take them into account when punishing the offender. The application of the 'worse off' test will produce a large list of foreseeable harms that may extend far beyond the immediate effects of the conduct and may affect not only the victim, the offender and their friends, families and employers, but the wider community as well. While judges and commentators agree that the harm done by a crime is a relevant consideration in sentencing, there is no agreement on the content of a suitable remoteness test,⁴ and I will explain shortly how the good life model would resolve this problem. A crime can affect many people in many different respects, and the exploration of the huge range of sub-categories of

³ This process is one that our common law judges have embarked upon with reasonable success. I have argued that the detailed suggestion put forward by von Hirsch A & Jareborg N in 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, which relies on a complicated series of mathematical adjustments (which I have reduced to a formula in 'The Science of Sentencing' above footnote 2 at 332-333) is too difficult to put into practice. I argued in 'The Science of Sentencing' at 349 that we should simply identify the relevant interests, explain in ordinary language the reasons why they are viewed as being worthy of protection, and express our response to a crime by allocating it a position within a numerical range. This approach, which views sentencing as an essentially comparative exercise based on our evaluation of the relative importance of the good life elements, might be labelled 'informed intuition based on reasoned discourse' to distinguish it from the 'intuitive synthesis' account of sentencing. Andrew von Hirsch, commenting on the surveys of the seriousness of crimes in *Censure and Sanctions*, (Clarendon Press, Oxford, 1993) at 29, has reported that ordinary people do seem capable of reaching a degree of agreement on these questions, and Andrew Ashworth has pointed out that the value of the von Hirsch-Jareborg living standard approach is the structure that it gives to the assessment process and the fact that this structure avoids impressionistic decision making: *Principles of Criminal Law*, 4th ed, (Oxford University Press, 2003) at 41.

⁴ See Ashworth A, *Sentencing and Criminal Justice*, 3rd ed, (Butterworths, London, 2000) at 123, 130-131, 'Victim Impact Statements and Sentencing' [1993] *Criminal Law Review* 498; Fox RG & Freiberg A, *Sentencing: State and Federal Law in Victoria*, 2nd ed, (OUP, Melbourne, 1999) at 225, 242, 257; von Hirsch A, *Past or Future Crimes*, (Manchester University Press, 1985) at 64-66, *Censure and Sanctions*, (Clarendon Press, Oxford, 1993) at 29-33; Walker N, *Aggravation, Mitigation and Mercy in English Criminal Justice*, (Blackstone Press, London, 1999) at 35, 121-134; Warner K, *Sentencing in Tasmania*, 2nd ed, (Federation Press, Sydney, 2002) at 80-82.

our interests in welfare and autonomy in Chapter Nine explained why harm has such a significant role in our assessment of a crime's effects on the good life for human beings. For this reason, and because harm – as something negative – is always a matter of public regret, I would suggest that it is important for sentencing judges to list in detail the full extent of the harm that an offender has caused.

This measure would serve to acknowledge publicly and fully the plight of all the victims who must come to terms with the effects of the crime. It may also bring home to the offenders the enormity of the consequences of their crimes. This approach may have restorative effects and despite the fact that, in the name of justice, we may then have to limit the categories of harm that we can actually take into account when sentencing the offender, this restorative purpose is a valuable objective. If it can bring offenders to acknowledge the harm that they have done and to express some remorse to their victims, it may assist both victims and offenders to deal better with the aftermath of the events. So, I would recommend that the judge should first list all the harm that has flowed from a crime and then explain why only some of that harm will be selected from that list and taken into account when determining the sentence.

I have argued that an evaluation of harm is an important component of our assessment of the seriousness of a crime. However, the effect that the harm done by a crime may have on the ultimate sentence of punishment is always moderated by the other respect based aspects of fault and wrongdoing. This point is clearly illustrated by the different sentences that we observe in cases of murder, manslaughter and causing death by dangerous driving, which can range from life imprisonment with no parole in the case of murder to only a very few months in the fatal driving cases.⁵ In all of these cases the harm done by the crime may be very much the same, but our responses differ because of the dominant effect that is given to the respect based component of fault.

I have explained in Part I of the thesis that these three components of wrongdoing, harm and fault are conceptually distinct. However, as I showed in Chapters Ten and

⁵ For example, in my own jurisdiction of Tasmania the longest current sentence for murder is life with no parole whereas some sentences for causing death by dangerous driving in recent years have been as low as six months wholly suspended, see: Warner K, *Sentencing in Tasmania*, above footnote 4 at 269-271 (murder) and 281-282 (causing death by dangerous driving). The fact that very high sentences may be imposed even when there is very little real harm done by an offence, for example, in a case of attempted murder where the victim is unhurt, also illustrates this point.

Eleven, we cannot give effect to our judgements of wrongdoing and fault in particular cases without referring to our factual harm based interests. Consequently, the distinction between the concepts does tend to blur at times. As we saw in Chapter Three, even though these concepts are not defined in terms of any of the others, the facts about harm and wrongdoing are often linked, just as the concepts of wrongdoing and fault are closely connected by the same normative ‘thought to be right’ element in their definition. Nevertheless, while the facts that we refer to when assessing each of these different aspects in actual cases may overlap to some extent, this need not hinder the sentencing process. If the fact is relevant to one of these components, it is not a problem if it is also relevant to one of the other aspects as well.

So, for example, the facts that a father has had sexual intercourse with his six year old daughter, would tell us something about the social meaning of the conduct as a deviation not only from our community’s views about the ideal nature of sexual relations as the legitimate physical expression of desire between adult partners of full capacity but also from our ideal vision of proper family relations that are marked out by trust and care. These facts would also give an indication of the harm objectively risked by the conduct to the child’s physical, emotional and sexual development and wellbeing, and in addition, would have some bearing on our interpretation of the father’s degree of fault and his betrayal of the parental role.

There are two main reasons why the ‘blurring’ phenomenon described above need not pose any real problems. The first reason is practical. Our common law sentencing system has developed to such a point that in many jurisdictions the relevant factors and the sentencing ranges associated with each crime have been so well established that our judges do not need to go through the full process of considering the separate aspects of wrongdoing, harm and fault every time. In most cases the judges simply establish the significant facts of the current case in the light of the factors that have been highlighted by previous cases, follow the guidelines established in previous cases, and select an appropriate penalty. The second reason is because these concepts are at their most useful at the theoretical level where we are explaining and justifying the broad structure of our sentencing process and constructing the rules that limit our responses to offenders. At this theoretical level, the distinct nature of each of these concepts takes on much more significance because the different focal point of each one – on either the meaning of the conduct, the attitude of the offender, or the effects of the conduct – allows us to give each concept a different rule-structuring role.

These roles and rules differ at the different stages of the sentencing process. At the stage when we are determining the general penalty range for each offence considered in the abstract we would have to first identify and evaluate:

- the general social meaning of the range of conduct forbidden by the law;
- the broad range of factual interests that the conduct might affect for the worse;
- the particular kind of fault element indicated by the nature of the crime, ie
 - specific personal fault in crimes of common humanity, or
 - diffuse general fault in crimes of common community.

Then, when an offender is to be sentenced for a specific offence we would consider:

- the specific meaning of the offender's actual conduct (which in most cases will not differ from the meaning of the conduct in the abstract sense);
- the factual interests that have actually been affected for the worse by the conduct, provided that they fall within the relevant limiting rules (discussed below);
- the actual degree of fault exhibited by the offender, considered in the light of all of the surrounding circumstances.

This description of the process reflects the proposition put forward in section 10.4 of Chapter Ten, that the same general aspect of wrongdoing as a failure of respect is replicated within all crimes, and the suggestion made in section 11.4 of Chapter Eleven, that the two aspects which occupy us most at sentencing are the two aspects that offer the most variation, namely, the components of harm and fault. The social meaning of the conduct, which we consider under the aspect of wrongdoing, tends in most cases not to vary between the abstract and the specific examples of the conduct. So, for example, in a case of theft, the abstract and the particular cases may carry exactly the same social meaning. However, in the crime of rape, for example, which may cover a wider range of disparate sexual misconduct, our assessments of the meaning of the conduct as a deviation from a socially and morally accepted norm may vary. So, a case of rape based on the continuation of intercourse after a withdrawal of consent may be characterised as a less serious deviation from the norm of acceptable sexual conduct by contrast with a case involving the rape of a child.⁶

⁶ See: Warner K, 'Sentencing in Cases of Marital Rape: Towards Changing the Male Imagination' (2000) 20 *Legal Studies* 592; and the rape guidelines case of *Millberry*, [2002] EWCA Crim 2891; [2003] 2 All ER 939.

Most often, however, it will be the two aspects of harm and fault that will exhibit the greatest range of variation as we move from the general penalty stage to the consideration of specific cases. The assessment of fault is not generally seen as presenting any great difficulties for sentencers,⁷ but as I have explained, the aspect of harm does pose problems. One problem is our difficulty in deciding whether to respond primarily to the harm that is objectively risked by an offence or to the actual harm that does in fact result from a particular breach. This is a normative or moral issue, and the good life model offers us a way to resolve it. My view, which I outlined in section 11.2 in Chapter Eleven, is that both of these factors should play a role in the sentencing process. At the legislative stage, the harm *objectively risked* by the forbidden conduct in its worst case should be taken into account as one of the factors relevant to setting the general penalty range for any given offence – provided that the categories of harm fall within the ‘scope of the wrong’ test. At the sentencing stage, the degree of any *actual harm* caused in each individual case will be one of the relevant factors when the judge allocates each individual offender a punishment within that pre-determined range. However, while the categories of harm will initially be limited to those set by the scope of the wrong, I suggest that we can justifiably extend our focus in cases where offenders have consciously intended by their criminal conduct to cause a particular harm that happens to fall outside those boundaries.

As part of our task of deciding upon the general penalty range at the legislative stage, we must consider the harm objectively risked or threatened by the forbidden conduct in the worst possible case. However, as I argued in section 7.5 of Chapter Seven (which applied this analysis to the case of murder), the relevant categories of harm should be limited by reference to the particular purpose(s) of each individual law. So, for example, if we consider the kinds of harm that may flow from a breach of the law against rape, we should take into account the fact that such offences affect the victims’ factual control over their own lives, their sexual autonomy, and their physical integrity. These crimes can also harm the victims’ long term physical, emotional and mental welfare, damage their ongoing capacity to form relationships of intimacy and trust, create a lasting sense of humiliation, degradation and worthlessness, and, in the case of children, can also affect their emotional and sexual development.

⁷ See von Hirsch, *Past or Future Crimes*, (Manchester University Press, 1985) at 64-66; *Censure and Sanctions*, (Clarendon Press, Oxford, 1993) at 29-33.

I would suggest that we should limit our assessment of the harm aspect of this crime only to these factors, which are directly located under the ‘umbrella’ of the crime’s purpose. It is quite foreseeable that further harms will also result from such an offence, because, as we saw in Chapter Nine, harm is far-reaching and the negative effects of an event may continue forever. For example, victims of rape may be so traumatised that they cannot continue in their employment. As a result, both the victims and their employers may suffer economic harm. Furthermore, the harm done by a crime may affect not only the immediate victims and their associates, but it may affect the wrongdoers and their associates as well. I argue that these categories of foreseeable harm should not be taken into account, because, following the reasoning outlined above, the primary issue in the criminal law is our desire to respond to the fact of the conduct itself. Under the good life model, the aspect of harm is significant, but secondary, and consequently I would suggest that one of the respect based rules that we should apply at the legislative stage would be to refer to the purpose of the wrong when we set limits on the kinds of interests that will be relevant to our assessment of harm. This rule, which is based on the ‘scope of the wrong’ sets the initial limit on the categories of harm that can affect an offender’s sentence.

When a judge must determine the punishment that the state will impose upon an individual offender for a specific crime, the degree of any actual harm that lies within those categories will be one of the relevant factors that determines where this particular event fits into the range already set by the ‘scope of the wrong’ test. So, at this stage, just as in the previous stage, the harm that the judge may take into account is limited by our purpose in forbidding the conduct. I have also argued that a judge would be justified in extending the limits and taking into account any harm that falls beyond those categories whenever any individual offenders intend by their conduct to cause that particular harm.

So, for example, in a case where a man decides to revenge himself upon his estranged wife by killing their child, the judge would be entitled, under the good life model of sentencing, to take into account the emotional distress caused to the mother of the murdered child.⁸ I would argue that normally the distress caused by the loss of

⁸ Facts based on the Victorian case of *Williamson*, unreported, SC VIC, 31 March 2000, Cummins J, as reported in *The Age*, 1 April 2000 at 1.

a family member in a case of murder would not fall within the scope of the wrong.⁹ So, if a mother of five children had been murdered, the distress caused to her five orphaned children would not be relevant to sentence (although it should be mentioned at sentencing as part of the restorative narrative of the effects of the crime).¹⁰ Likewise, if a murder victim, who was a sitting member of parliament, had been killed by a political rival in order to advance his own political aim of being elected as the deceased member's replacement, the political loss to the community would be a relevant harm under the good life model's account of sentencing, because the conduct itself carries the relevant message of disrespect to the democratic process.¹¹ However, if a random murder of an unknown stranger happened by chance to take the life of a member of parliament, the effect on the democratic process would not be relevant.

I have suggested throughout this thesis, that the relevant harm that can be taken into account should initially be limited to setbacks only to the specific interests that are the objects of each particular law's protection, and that this limit may be extended in certain specific cases where any individual offenders intend by their conduct to cause a particular harm that falls beyond that initial limit. This analysis utilises the two purposes that lie behind the existence of any given criminal law to justify those limits. The first is the general over-riding purpose of the criminal justice system itself; the second is the specific purpose of the particular law under consideration. The general object of the wider system as a whole, which is to stand up for each person's

⁹ In the case of *Previtera* (1997) 94 A Crim R 76 (NSWSC) Hunt J held that it is not appropriate to take into account the effects of the death upon relatives. Note, however, that many statutes like the *Sentencing Act 1991* (Vic) that allow the admission of victim impact statements by relatives of murder victims do make provision for such distress to be taken into account: see Fox & Freiberg, *Sentencing: State and Federal Law in Victoria*, above footnote 4 at 168-170.

¹⁰ Facts based on the case of *Lewis* [2001] NSWCCA 448. However, in this case the court held at [67] that the degree of harm which the offender knows will be caused by the offence is relevant. Under the good life account this case must be seen as wrongly decided because this harm, while foreseeable, is beyond the scope of the wrong, and, by contrast with the case of *Williamson*, above footnote 8, the limits could not be extended because the victim was not killed with the conscious aim of distressing the children. (If the murder had taken place in front of the children, their distress at seeing their mother killed would be relevant, because killing someone in front of others is a relevant act of disrespect both to the victim of the murder and to those forced to witness it.)

¹¹ Example taken from the case of *Ngo* [2001] NSWSC 1021, Dunford J, where a well known member of the NSW state parliament was murdered by a political rival.

equal entitlement to be respected by others and to be treated as an equal, provides us with our moral justification for using the normative aspects of a crime to limit our responses to its factual harm based aspects.¹² The particular object of the specific law's protection then provides a second, more precise, limit on the actual categories of harm based interests that fall within the law's purpose. Furthermore, the same general purpose that justifies the existence of the criminal justice system and the limits that we impose on our responses to those whom we have convicted also explains and justifies the fault based exception that extends those categories. The first containing limb of the test focuses on the harm that is objectively found within the scope of the wrong. The second extending limb looks at the subjective attitudes of the offender; and both limbs justify our responses on the same normative, respect based grounds. The full two-limbed version of the remoteness test therefore reflects the extent to which we read the offender's conduct as an expression of contempt for the equal value and the equally shared interests of others that the state exists to protect.

As I explained in section 11.2 of Chapter Eleven, one of the benefits of adopting this approach is that it allows us to assess all crimes in the same way, whether they are unsuccessful attempts or whether they are fully successful crimes. This solution to the problem of harm's role in sentencing is made possible not only because we have focused on the values that unite us and sought to understand the deeper moral purpose of the criminal law and the conception of justice that is found within its practices, but also because we have focused on the ordinary meanings of the key concepts of harm, wrongdoing and fault and been able, first to differentiate each concept from the others, and then to give each one a specific role in structuring our rule of remoteness.

There are, however, two other rules that I want to suggest should also be recognised as limiting harm's relevance to an offender's sentence. The first requires us to reinterpret the justification behind already familiar rule that we currently use to govern the factual basis for a sentence; the second is one which I suggest follows as a matter of principle from the good life model's account of the priority of the normative over the factual. I suggest that the account of our sentencing law that I have developed in this thesis can explain and justify the procedural rules that govern the

¹² Likewise, in the law of negligence, reasonable foreseeability, which is the reason why civil liability is imposed in the first place, is also part of the remoteness test which limits the extent of that liability: Fleming JG, *The Law of Torts*, 9th ed, (LBC Information Services, Sydney, 1998) at 233.

facts that the judge can take into account when determining the basis for the sentence.¹³ These rules limit the facts relating to harm (and in some cases, the facts relating to fault) that a judge may take into account, even where those facts may lie within a category that has passed the tests of causation, attribution and remoteness. Any facts that the state itself has wrongfully failed to include in the charge against the offender or any facts that the state has failed to properly prove to the satisfaction of the fact finder are ruled out of consideration. So, under the rule in *Bright* and *De Simoni*,¹⁴ any facts about harm that have been negated by a jury's verdict, any harm that has flowed from an offence that the offender has not been charged with, or any matters of aggravation that could, and should, have been charged in the indictment if the prosecution intends that those facts should be used against the offender in sentencing, are normally ruled out on grounds of fairness.

I suggest that these rules can be justified by the same reasoning that I have set out when explaining the remoteness rule. I would argue that they are based on a principle of absolute fault, and that they apply whenever the state has, by its own wrongful conduct, failed to respect the entitlement of the offender to be respected and treated as an equal in the criminal justice process. The power and capacity of the two parties to any criminal case are vastly unequal, and, as we have seen in Chapter Eleven, our recognition of these kinds of inequality affects our judgement of the conduct of the more powerful party. In the same way that an adult of full capacity who deals with a child must make positive efforts to equalise the positions between them, the state has a duty to make every effort within the criminal justice process to treat offenders fairly and to have due regard for their vulnerable position of powerlessness.¹⁵ This means that whenever the state's breach of its own rules has improperly disadvantaged the offender, it should be absolutely precluded by its own fault from gaining any advantage from its own wrongdoing. Consequently, any facts that relate to harm that

¹³ See Davis J, 'Factual Basis of Sentencing' in Warner K, *Sentencing in Tasmania*, 2nd ed, (Federation Press, Sydney, 2002) 28-48, especially my discussion at 41-46 of the rule found in the English case of *Bright* [1916] 2 KB 441 and Australian High Court case of *De Simoni* (1981) 147 CLR 383.

¹⁴ See *Bright* [1916] 2 KB 441 at 444-445, cited by Gibbs CJ in *De Simoni* (1981) 147 CLR 383 at 390, which I discuss in 'Factual Basis of Sentencing' above footnote 13 at 41-46.

¹⁵ See the recent comments by Gleeson CJ and Hayne J in *Carroll* [2002] HCA 55 at [21]-[28], pointing out some of the fundamental underpinnings of the criminal law.

have been improperly obtained, or which have not been properly charged or proved, cannot be taken into account against the offender.¹⁶

I would therefore add the procedural rules governing the factual basis for a sentence to my list of the respect based rules which limit the effect that the harm done by a crime can have on an offender's punishment, and I would classify them as being based on a principle of absolute fault, because in these cases the state itself is completely to blame for the breach of its own rules. I also want to add to that list a third rule which I suggest is based on a principle of proportionate or relative fault, and which I argue flows as a matter of principle from the good life model's account of the priority of the normative over the factual. This third rule relates to the quantum of sentence. It would apply whenever the state is not absolutely, but is only partly to blame, either for the commission of an offence or for the harm that has flowed from an offence. It would provide that in cases where the state is itself partly responsible for the harm resulting from the crime, it should be precluded from exacting the full measure of punishment from the offender for that harm.¹⁷

The following examples illustrate the kinds of circumstances where the principle might apply, and in some cases it can be seen to justify some of the mitigating factors that we currently accept and take into account within our sentencing law, such as:

- An offender's deprived social background, for example, cases involving aboriginal offenders;¹⁸
- Any previous abuse of the offender which the state has failed to respond to or to prevent, for example, in cases where battered women who seek refuge or police protection are failed by the system;¹⁹

¹⁶ This reasoning also explains our rules excluding the admission of evidence that has been illegally obtained.

¹⁷ I have expanded upon this principle in Davis J, 'Fault or Forgiveness: The Politics of Punishment in Shakespeare's *Measure for Measure*' paper presented to the *Second International Conference on Sentencing and Society*, at the Centre for Sentencing Research, Law School Strathclyde University, Glasgow, Scotland, UK, 27-29 June 2002. A somewhat similar, but rather more narrow, principle of 'reciprocal obligation' has been mooted by Arie Freiberg in *Sentencing Review: Pathways to Justice*, (Department of Justice, Melbourne, 2002) at 44 and 103-105.

¹⁸ See, eg: *Neal* (1982) 149 CLR 305; *Jabaltjari v Hamersley* (1977) 15 ALR 94 (NT SC); *Rogers and Murray* (1989) 44 A Crim R 301 (CCA WA).

¹⁹ See, eg: *Kennedy* [2000] NSWSC 109; *Varagnolo*, unreported, SC NSW, 21 March 1996, McInerney J; *Roberts*, unreported, SC NSW, 1 August 1989, Hunt J.

- Cases of gambling addiction, where the state has allowed the spread of gambling for its own financial purposes, but has negligently failed to assist those who become addicted to gambling;²⁰
- Cases of drug addiction, where the state has forbidden the use of certain drugs, but where it has also failed to prevent the distribution and supply of those drugs in the community;²¹
- Any improper acts of state entrapment;²²
- Cases where the harm done by an offence is exacerbated by negligent actions of state officials (for example, where the effects of an act of arson are magnified by poor forest management, inadequate building regulations and controls, etc);²³
- Cases where the state has improperly failed to monitor the court ordered treatment of a known offender on a community based order or probation, who subsequently commits another offence;²⁴ and
- Cases where the conduct of state officials, in breach of their duty, has partly contributed to the commission of an offence.²⁵

²⁰ See Magistrate Crisp's comments on passing sentence in the Victorian case of *Gunnell*, 3 October 2002, reported in Munro I, 'Court Blasts Gambling Shame' *The Age*, 4 August 2002, 6.

²¹ An acknowledgment of partial responsibility somewhat similar to the principle of proportionate or relative fault may therefore justify the recent moves to establish special drug courts.

²² See discussion and references in section 11.3 of Chapter Eleven.

²³ In Australia in the summer of 2002, a number of New South Wales politicians, including the NSW Premier Bob Carr, entered the 'law and order' debate about the proper response of the criminal law to young arsonists who had set fires in the Blue Mountains. It was pointed out by critics that the extent of the damage done by the fires was partly the fault of the government's failure to respond properly to recommendations made by the NSW coroner some six years earlier after deaths caused in previous bushfires: Fyfe M, 'Heroes and Villains' *The Age*, 5 January 2002, Section 2, 3.

²⁴ See *McCracken* (1988) 38 A Crim R 92 (CCA VIC), discussed in Fox RG, 'Sentencing a Compulsive Paedophile: Shame File or Science?' 65 *Law Institute Journal* 523.

²⁵ See *Lock*, unreported, VIC SC, 2 August 1996, Cummins J, (discussed in Tippet G & Munro I, *Writing on Gravestones*, (Harper Collins, Sydney, 2001) at 1-11 and Tippet G, 'Slaying the Monster' *The Age*, 22 June 1997, at 14-15) where the sentencing judge held that two mitigating factors in a case of murder were the fact that the state had failed to protect the offender from shocking sexual abuse as a child, and the fact that police, knowing that the offender was severely traumatised by the offences committed against him, had advised him to go and find the whereabouts of his abuser. Subsequently, the offender, who had found his abuser, killed him.

Significance

This section has presented an argument justifying three respect based rules that I suggest should be adopted to control the decisions that our judges make about harm's relevance to sentence. The two limbed rule of remoteness is designed to respond to the extent to which an offender's harmful conduct is interpreted as a failure of respect. It excludes from the judge's consideration any harm to any interest that is beyond the scope of the wrong unless the offender has intended to cause that particular harm or has consciously adverted to it when acting. The second rule relates to the factual basis for a sentence and rules out of consideration any fact about harm that the state has failed to cover in the charge against the offender or any fact about harm that the state has failed to prove to the satisfaction of the fact finder. This rule of procedure, which is based on a principle of absolute fault, can be contrasted with the third rule, which is based on a principle of comparative or proportionate fault. This rule relates to the quantum of sentence and it provides that in cases where the state is itself partly responsible for the harm resulting from the crime, it is precluded from exacting the full measure of punishment from the offender for that harm.

I have argued that each of these rules is based on a special conception of a crime as conduct which fails to respect others as persons of equal dignity, worth and value. These rules give the same priority to the normative concepts of fault and wrongdoing that we have given to these two respect based aspects in the earlier stages of the criminal justice decision making process. As a result, they not only satisfy the tests of rationality, consistency and coherence, but they also satisfy our need to find morally and politically acceptable reasons for state punishment of offenders. The good life model of a crime and the relational element of respect contained within it can therefore be seen as providing us with all the guidance that we need when we consider how we ought to conduct ourselves towards others. Crucially, this guidance applies not only to the conduct of all the individuals in the community, but also to the conduct of all of the officials, judges and legislators who act for the state. Under the good life model, right conduct is conduct that respects others as equals. The beauty of this account is that it governs the state's relations with individuals in the same way – and for the same reasons – that it governs each individual's relations with other members of the community. Our vision of ourselves as equals therefore gives every person the benefit of the criminal law's protection, and, if any person breaches the law, that same vision also serves to limit the burden of punishment that will be imposed upon them.

12.4 Conclusion: criminal justice and the problem of punishment

This thesis aimed to answer a series of questions about the problem of harm. Having answered them, I am now in a position to consider some of the questions about the problem of punishment that I have resisted answering until now. The need to locate harm's place on the moral map of the criminal law made it imperative to find a way not only to draw the map itself,²⁶ but also to consider its contours and its proper boundaries. Consequently, I want to conclude this thesis by reflecting briefly upon the answers that the good life model allows us to give to six of the traditional questions that philosophers and legal academics have posed about criminal justice and the problem of harm, namely:

1. What is the general justifying aim of the criminal justice system and what is the role of the state within that system?
2. What conduct may the state rightly make criminal?
3. What conduct is more properly dealt with by the civil law?
4. Who may rightly be convicted and punished for breaches of the criminal law?
5. Why punish?
6. What are the limits on criminal punishment?

The answers that the good life model provides to these questions follow.

Question 1

What is the general justifying aim of the criminal justice system and what is the role of the state within that system?

The good life model links the function of the state directly to the function of the criminal law and suggests that the political authority to punish is derived from our need for the state and our vision of the good life for human beings living together under the protection of the state. In our modern, western, liberal democracies the state exists to preserve and maintain the conditions under which we can live good lives together as part of a community of equals. Our vision of the good life in a good community is determined by our common nature as human beings, our common identity as members of a democratic community of equals, and our shared passion for

²⁶ I have borrowed this phrase from John Gardner, in 'Crime: In Proportion and in Perspective' in Ashworth A & Wasik M (eds), *Fundamentals of Sentencing Theory*, (Clarendon Press, Oxford, 1998) 31 at 41 and 48. See my discussion in the text of Chapter Eleven at footnote 191.

justice. I have argued that our criminal justice practices appear to contain a special conception of justice that requires equal treatment of equals by equals, and I suggested that, through the criminal law, the state aims not only to do equal justice to those who have failed in their own conduct to do equal justice to others but also to stand up for our entitlement to pursue and enjoy a good life within a good community. I have argued that the three elements of the good life that the state must protect are our welfare, our autonomy and our desire to be respected and treated as an equal by others. Consequently, I conclude that the state's general justifying aim in the criminal justice system is to give effect to our community's vision of equal justice and the good life, by standing up for each person's equally shared entitlement:

- to pursue and enjoy their welfare and exercise their autonomy;
- to be respected and treated as an equal by others in the community; and
- to be respected and treated as person of equal value by the state itself.

Question 2

What conduct may the state rightly make criminal?

The visions of justice and the good life that animate this model of the criminal law also provide us with two principles that help us to identify not only the kinds of conduct that should be criminalised, but also the kinds of conduct that should be dealt with by the civil law (and the kinds of conduct that are simply not legally wrongful at all). I have argued that in our community, criminal wrongdoing is conduct that is seen as a deviation from the primary norm that requires each person to respect others by treating them as equals. I have defined a crime as conduct that evidences a failure to respect the equal value of others (the normative limb) and their equal entitlement to pursue and enjoy their welfare and exercise their autonomy within the boundaries provided for by the state (the factual limb).

Before we can justly criminalise any given conduct we must meet the 'harm to others' principle by identifying one of our equally shared factual interests, which we share equally with others by reason of our common identity as human beings, as animals or as members of the community, that is directly threatened by the impugned conduct. We must also satisfy the 'respect for others' principle. This requires us to show, first, that the conduct can be read as treatment of or conduct towards others, and secondly, that this treatment of others is unequivocally seen as a failure to respond properly to the equal value of others.

These two principles allow us to resist any suggestion that the criminal law should legislate on the basis of conventional morality, punish wrongdoing of every kind, or forbid risky conduct of all kinds. It rules out on principled grounds any legislation based on the paternalist punishment of those who would harm themselves and any legislation based on punishing any behaviour or expression of opinions only because they might give offence to others.

Criminal justice, as equal justice, protects our equal vulnerability to suffering harm by conduct that threatens the interests that we share equally because of our equal identities and our equally shared purpose of living good lives together as a community of equals. It does this by imposing an equal, reciprocal and universal duty on each and every person within the community of equals and it responds to breaches of that duty by treating equal cases equally and imposing equal punishments upon offenders in all cases. This conception of criminal justice as equal justice also helps us to answer the third question which inquires into the justification of the boundary between the criminal law and the civil law.

Question 3

What conduct is more properly dealt with by the civil law?

I have argued that the particular obligations imposed on us by the civil or private law to respect the particular interests of others do not appear to be based on our status as equals, but are derived instead from the particular circumstances and the special bilateral relationships that we find ourselves in and the particular status and identities of the individuals with whom we find ourselves in proximity. Unlike the criminal law, which protects our equal status and our equal vulnerability to suffering harm, civil justice, as particular, individual justice, protects the particular identities and the specific bilateral relationships that put us in harm's way. It imposes only limited and contingent duties and the justice it provides, which is oriented around compensation for harm, is limited, uncertain, contingent and unequally applied. These differences between the criminal law, which we have chosen to treat as a necessity, and the civil law, which we treat as a luxury, reveal that the two paradigms have been developed and maintained for very different purposes. Criminal conduct is conduct that fails to do equal justice to others, whereas the conduct which is more properly dealt with by the civil law is that which fails to respect our special bilateral relationships and the importance of the particular purposes behind those relationships.

Question 4

Who may rightly be convicted and punished for breaches of the criminal law?

The analysis produced by the good life model suggests that only those who are at fault can be convicted. I have defined criminal fault as a personal failure to recognise and respond properly to the equal value of others and demonstrated that in cases where a person accused of a crime has treated the interests of the other person as carrying a value that is equal to their own, we do not convict and we do not punish. A similar result occurs whenever there is evidence that the accused was incapable of recognising and/or responding to the equal value of others. So, once we either doubt the accused's factual capacity to respect others as equals or have accepted that they have in fact responded to another as an equal, the state is not entitled to punish that person for their conduct.

Question 5

Why punish?

I do not believe that there is any ethical or moral theory that can explain the 'purpose of punishment' and which we can use to guide our decisions in the criminal law. I agree with Nils Christie that punishment is 'an intended evil'²⁷ and I have suggested that, while our choice to use harm as the currency of our responses to those who have breached the criminal law can be justified by morally and politically acceptable reasons, it nevertheless remains our duty to try to find other, better ways of responding to offenders. My justification of criminal punishment is, therefore, both limited and contingent. It rests on my understanding of the criminal law's purpose, which, on my account, is in part to do equal justice to those who have failed in their own conduct to do equal justice to others. I have suggested that at present, the only way that we have found to fully honour the fundamental norm of equal respect that marks a crime out as a fundamental form of wrongdoing is to focus on the wrongdoers alone and use harm itself as our response. So, under the good life account we do not return suffering to wrongdoers because we feel morally compelled to do so, but because we choose to stand up every time – in the only way we have yet found – for our moral and political entitlement to be treated as an equal among equals.

²⁷ Christie N, 'Punishment' in Kuper A & Kuper J (eds), *The Social Science Encyclopedia*, (Routledge, London, 1996) 708. See also Christie N, 'Against Just Desert' (1992) 5 *Canadian Journal of Law and Jurisprudence* 5.

Question 6

What are the limits on criminal punishment?

The good life model imposes two kinds of limits on the sentences of punishment that the state is entitled to exact from convicted offenders. The first limit is focused on the kinds of punishment that we may use in sentencing and the second limit applies to restrict the quantum of punishment. Under the good life model we must control our punitive responses to offenders by following the same duty of equal respect that justified and controlled our decisions to legislate the criminal law and to convict offenders for breaches of those laws. I have argued that our punishment practices can be justified only as a matter of choice to stand up for the equal abstract moral and political value of every person in the community, and not as a matter of duty dictated by any theory of ethical value like utilitarianism or retributivism. This means that we must accept as a moral obligation, the duty to ensure that offenders undergoing punishment are respected and treated as persons of equal dignity, worth and value.

Once criminal punishment is seen as a purposeful and principled choice to use harm to stand up for our vision of ourselves as equals, rather than as a moral duty to inflict pain, it becomes clear not only that the harm that we choose to do must be limited as much as possible, but also that it must be controlled by our broader purpose of standing up for the fundamental norm of equal respect. This conception rules out the death penalty and any cruel or inhumane punishments, and while we might legitimately set back the offenders' welfare interests and restrict their opportunities to exercise their autonomy, we are at the same time obliged to make sure that our punitive practices are humane, respectful of the offender's dignity, and do not impair their underlying capacity to exercise that autonomy in the future. Furthermore, our punishments must not deny the offenders' standing as equal citizens and should not tolerate any concept of civil death.

I have rejected the utilitarian or retributivist accounts of the criminal law and I would argue that, just like our decision to use harm as the form of our response to offenders, settling upon the actual quantum of punishment is also a matter of choice which cannot be dictated by any theory of ethics. There is, therefore, no natural or proper measure of punishment that we are obliged to calculate and then inflict upon offenders. However, our duty to do equal justice to offenders by treating like cases alike and different cases differently, does nevertheless require us to preserve the principle of proportionality that is so important in modern sentencing law – provided

that we conceive of the principle as reflecting a connotation of comparative justice rather than retributive justice. We have a duty under the good life model to limit ourselves to giving only the amount of punishment that each offender deserves in the light of the punishments that we have chosen to inflict upon others. This means that each punishment must be proportionate to the social meaning of the act of criminal wrongdoing, the kinds of harm threatened and actually caused by that conduct and the degree of fault displayed by the offender.

Each of these sentencing decisions must also be controlled by our broader purpose of standing up for the fundamental norm of equal respect. The 'equal respect for others' principle limits the criminal law all the way through. Consequently, I have used the two concepts of wrongdoing and fault in this chapter to justify the construction of the rules that should be used to limit the kinds of facts about harm that are relevant in sentencing and also to control the extent to which the state is entitled to take them into account when deciding upon the quantum of punishment that it may legitimately impose upon the offender.

I also want to suggest that we should impose a final equality based limit on the punishments that we choose to impose upon offenders. I argue that we should scale back our range of punishments on the grounds that we punish only a very small proportion of wrongdoers. Many are not apprehended, let alone convicted, and as a matter of equal justice, we should acknowledge that those whom we do apprehend, convict and punish are bearing a disproportionate burden of harm by comparison with those who are equally blameworthy, but who will never be punished. In order to recognise and remedy this inequality and to give full effect to our notions of comparative deserts and proportionality we should scale back the general punishment levels on a system wide basis. We use the punishment of these persons as a way of standing up for our own value and of preserving the conditions under which we can live in safety, and we owe it to them to recognise the price that they are paying so that we can maintain our vision of ourselves as equals and of our community as a place where we are all entitled to an equal opportunity to pursue and enjoy the good life that we want for ourselves.

This completes the final answer to the questions about criminal justice and the problem of punishment and makes it possible, finally, to conclude the thesis.

Conclusion

This thesis has explored the problem of harm, explained its significance in the criminal law, and examined the ways that it can be given a proper role in sentencing law. My account of the criminal law and harm's place within it has suggested that the unique and fundamental form of justice that is embodied in our system offers such a powerful justification for the structure and form of our responses both in our criminal law and in our sentencing law that it allows us to reject any of the theories of punishment put forward by utilitarians and retributivists. Rather than relying on a theory of ethical value that tells us what is right and wrong, or searching for a moral purpose of punishment that will dictate the precise quantum of punishment, I chose instead to take a different approach to these traditional questions about criminal justice and the problem of punishment and based my interpretation of the criminal law on an analysis of the facts about ourselves, our shared identities, our current political community, and the kinds of lives that we want to live together.

This method of analysis produced a model of the criminal law that has explained the role played by the concepts of wrongdoing, harm and fault at each of the three stages of legislation, conviction and sentencing. It linked these concepts to the three elements of the good life that we value most, namely, our welfare, our autonomy and our desire to be respected by others as an equal, and it discovered that the element of equal respect is consistently and properly viewed as the most important. This analysis also revealed that our practice of criminal punishment does more than symbolically proclaim its allegiance to the fundamental norm of doing equal justice; it embodies that special conception of justice within all of its processes. Our allegiance to this conception of equal justice, our vision of the good life and our commitment to each person's fundamental entitlement to be respected by others and treated as an equal as they search for the good life, combine to ensure that the decisions we make within the criminal justice decision making process can be structured around a single, coherent and consistently applied scheme of values. They also allow us to impose principled limits on the criminal law at each of the stages of the criminal justice process.

The method of analysis used in this thesis was based on Wittgenstein's philosophical method and was inspired by the approach to the nature of the good life for human beings who live together in democratic communities that was put forward by Aristotle over two thousand years ago. Aristotle believed that part of the beauty of human existence is to be found in our human fragility and our vulnerability to

damage, loss and disaster.²⁸ My thesis has explored this vulnerability to harm and revealed the extent to which our attitudes to others and our responses to the value of their harm based interests can help us to understand and explain our current criminal justice system and the two dimensional vision of the good life that is embodied within it. I have argued that although an appreciation of the harm based dimension of any given conduct is essential to the construction and the application of our criminal laws, it is the normative respect based dimension of that conduct that takes priority in any contest between the two. However, in our eagerness to use the processes of the criminal law to stand up for the equal moral and political value of each human being within our community, we must not lose sight of the other important human attributes that we share in equal measure, namely, our human fragility and our openness to harm.

I have argued that to live a good life, we must not only care about the way that we conduct ourselves towards others, but we must also care about the way that our treatment of others affects their lives. Each one of us within a democratic community has two duties that correspond to the two dimensions of our vision of the good life. The first is to do justice to others by respecting them and treating them as persons of equal dignity, worth and value. The second is to take care about the way that our conduct can harm others by affecting for the worse their lives, their welfare, and their autonomy. This means that if we want to be seen, in every sense, to have lived a good life and if we want our communities to be seen, in every way, as being good communities, we must care as much about the effects of our punishments on offenders as we do about justice in punishment. If, as a community, we have chosen to inflict harm on offenders in order to demonstrate our commitment to our special vision of the good life, we must not forget the human fragility of those whom we punish and so we owe it to ourselves and to our communities, as much as we owe to them, to give watchful attention at each point of our criminal justice system, not only to the double duties imposed upon us by our visions of equal justice and the good life, but also to the reasons behind our choices to punish, and to the challenges posed by the problem of harm.

²⁸ Nussbaum MC, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, (Cambridge University Press, 1986), see especially Part III discussing Aristotle's views on the fragility of the good human life.

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